5

Supreme Court, U.S.
FILED

06-769 NOV 30 2006

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

DONALD WEEMS AND MICHAEL BRIGGS,
Petitioners,

v.

LAWRENCE JOHNSON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITION FOR WRIT OF CERTIORARI

GREGORY T. KARBER
C. BRIAN MEADORS
ROBERT D. KELLY
Counsel of Record
PRYOR, ROBERTSON & BARRY, PLLC
315 NORTH 7TH STREET
P.O. DRAWER 848
FORT SMITH, AR 72902-0848
(479) 782-8813
(479) 785-0254 facsimile

Attorneys for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

What are the minimal procedural due process protections required in "dangerousness" assessments of sex offenders where the assessments are material to the application of regulatory statutes against sex offenders?

LIST OF PARTIES

The parties below are:

Petitioners Donald Weems and Michael Briggs, individuals; and

Respondents Lawrence Johnson, et al. in His Official Capacity as Chief of Police, Little Rock Police Department; Little Rock Police Department; Daniel Moses, in His Official Capacity as Chief of Police, Pine Bluff Police; Paula Stitz, in Her Official Capacity as Chairperson of the Arkansas Sex Offenders Assessment Committee; Larry B. Norris, in His Official Capacity as Director, Arkansas Department of Correction; G. David Guntharp, in His Official Capacity as Director of Arkansas Department of Community Correction; and Sheri J. Flynn, in Her Official Capacity as Administrator of Sex Offender Screening and Risk Assessment.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 6

I. There is a split of authority regarding the requirements of procedural due process in assessing sex offenders: the Eighth Circuit's holding conflicts with several states and the Third Circuit 6

CONCLUSION 12

APPENDIX

APPENDIX A:

7/13/06 Circuit Court Opinion 1a

APPENDIX B:

11/30/04 District Court Memorandum Opinion and Order 19a

APPENDIX C:

Amendment Fourteen to the U.S. Constitution . . . 58a

ARK. CODE ANN. § 12-12-902 - Legislative findings 59a

ARK. CODE ANN. § 12-12-913. Disclosure 60a

ARK. CODE ANN. § 12-12-917. Evaluation protocol--examiners 65a

ARK. CODE ANN. § 12-12-922. Alternative procedure for sexually violent predator evaluations 73a

ARK. CODE ANN. § 5-14-128. Registered sex offenders prohibited from living near schools or day cares 77a

Sex and Child Offender Guidelines and Procedures, Code Ark. R. 004 00 002 at 8 (2002) (reproduced in part) 79a

Sex and Child Offender Guidelines and Procedures, Code Ark. R. 004 00 002 at 14 (2002) (reproduced in part) 80a

TABLE OF CITED AUTHORITIES

CASES

Connecticut Department of Safety v. Doe,
538 U.S. 1 (2003) 7, 10

Doe v. Pataki,
3 F. Supp. 2d 456 (S.D.N.Y. 1998) 9, 10, 11

Doe v. Poritz, 662 A.2d 367 (1995) 9

Doe v. Sex Offender Registry Bd.,
697 N.E.2d 512 (1998) 11

E.B. v. Verniero,
119 F.3d 1077 (3rd Cir. 1997) 11

Greenholtz v. Nebraska Penal & Correctional Complex,
442 U.S. 1 (1979) 7

State v. Guidry, 96 P.3d 242 (Haw. 2004) 7

In re W.M., 851 A.2d 431 (D.C. 2004) 11

J.J.F. v. State, 132 P.3d 170 (Wyo. 2006) 11

Jurek v. Texas, 428 U.S. 262 (1976) 7

Kansas v. Hendricks, 521 U.S. 346 (1997) 6

Monks v. New Jersey State Parole Bd.,
277 A.2d 193 (1971) 9

Noble v. Board of Parole and Post-Prison Supervision,
964 P.2d 990 (1998) 10

People v. David W.,
733 N.E.2d 206 (2000) 10, 11

People v. Ross,
646 N.Y.S.2d 249 (1996) 2

Rodriguez v. Rosenblatt,
277 A.2d 216 (1971) 9

Schall v. Martin, 467 U.S. 253 (1984) 6

State v. Kunz, 259 A.2d 895 (1969) 9

State v. Wingler, 135 A.2d 468 (1957) 9

STATUTES

28 U.S.C. § 1331 6

ARK. CODE ANN. § 5-14-128 . . . . . 2, 5, 7

ARK. CODE ANN. § 12-12-902 . . . . . 1, 7

ARK. CODE ANN. § 12-12-913 . . . . . 1, 4, 7

ARK. CODE ANN. § 12-12-917 . . . . . *passim*

ARK. CODE ANN. § 12-12-922 . . . . . 2, 8, 12

ARK. CODE ANN. § 25-15-201 8

ARK. CODE ANN. § 25-15-212 . . . . . 5, 8

ARK. CODE ANN. § 25-15-213 8

Sex and Child Offender Guidelines and Procedures, Code Ark. R. 004 00 002 (2002) 2, 4

OPINIONS BELOW

The ruling of the United States Court of Appeals for the Eighth Circuit dated July 13, 2006 affirming the District Court's decision to dismiss the plaintiffs' complaint is officially reported at 453 F.3d 1010 and is reproduced in App. A at 1a.

The decision and order of the United States District Court for the Eastern District of Arkansas dismissing plaintiffs' complaint was entered December 1, 2004. The decision is not reported in the official reporter and is reproduced in App. B at 19a.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 13, 2006. Rehearing and rehearing en banc were denied on August 18, 2006. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13(3) because it is being filed within 90 days of the denial for rehearing as extended by Justice Alito on November 8, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portion of the Fourteenth Amendment to the United States Constitution is set out in App. C at 58a.

ARK. CODE ANN. § 12-12-902 is set out in App. C at 59a.

ARK. CODE ANN. § 12-12-913 is set out in App. C at 60a.

ARK. CODE ANN. § 12-12-917 is set out in App. C at 65a.

ARK. CODE ANN. § 12-12-922 is set out in App. C at 73a.

ARK. CODE ANN. § 5-14-128 is set out in App. C at 77a

Page 8 of the *Sex and Child Offender Guidelines and Procedures*, Code Ark. R. 004 00 002 (2002) (reproduced in part), is set out in App. C at 79a.

Page 14 of the *Sex and Child Offender Guidelines and Procedures*, Code Ark. R. 004 00 002 (2002) (reproduced in part) ("*Guidelines*") is set out in App. C at 80a & 81a.

STATEMENT OF THE CASE

The State of Arkansas convicted Petitioner Donald Weems of exposure to a minor, a class A misdemeanor. After completing his sentence, Mr. Weems moved to Little Rock, established his residency, and properly registered as a convicted sex offender. The State assessed Mr. Weems as a Level 3 offender.[1]

After Mr. Weems's registration and assessment, Arkansas amended its sex offender law by forbidding Level 3 offenders from living within two thousand feet of a school or daycare center. *See* ARK. CODE ANN. § 5-14-128 (the "Registration Act"). Respondent Lawrence Johnson, the chief law

---

[1] Every state in the union has some sort of sex offender registration and notification law. A list of citations can be found at *People v. Ross*, 646 N.Y.S.2d 249, 250 n.1 (1996). A significant portion of the states have some sort of system for assessing offenders' future dangerousness and then placing restrictions on offenders based on the assessment.

enforcement officer for Little Rock, enforced this law. Respondent Johnson sent Mr. Weems a letter ordering Mr. Weems to relocate from his established residence. Failure to relocate, said Respondent Johnson, would result in Mr. Weems being criminally prosecuted.

The State of Maryland convicted Petitioner Michael Briggs of first degree rape and sentenced him to two life terms plus fifteen years. However, Petitioner Briggs asked for — and the courts granted him — a hearing for post conviction relief. Prior to the hearing, the State of Maryland offered Mr. Briggs a reduced sentence in exchange for Mr. Briggs dropping his petition for post conviction relief. Mr. Briggs accepted the offer. The State of Maryland released Mr. Briggs on probation. Mr. Briggs then moved to Arkansas to live with his elderly mother.

After moving in with his mother, Mr. Briggs properly registered as a convicted sex offender. The State of Arkansas assessed Mr. Briggs as a Level 3 offender. Subsequently, Arkansas amended the Registration Act, forbidding Mr. Briggs from living within two thousand feet of a day care or school. Like Mr. Weems, Mr. Briggs had to relocate from his established residence or be criminally prosecuted.

Under the Sex Offender Registration Act of 1997 ("Registration Act"), codified at ARK. CODE ANN. § 12-12-901 *et seq.*, the State of Arkansas makes a case-by-case assessment of "the public risk posed" by an offender. ARK. CODE ANN. § 12-12-917(b)(1). Risk or dangerousness assessments are to be conducted on all persons required to register under the Registration Act. ARK. CODE ANN. § 12-12-917(b)(1)(A)-(B). The State assigns a level of risk based on its prediction of the offender's likelihood of engaging in future criminal activity. ARK. CODE ANN. § 12-12-

BEST AVAILABLE COPY

913(c)(2)(A) and § 12-12-17(b)(1). Risk assessments are also to be reviewed when an offender is released from confinement in a correctional facility, prior to release after an acquittal on grounds of a mental disease or defect, at the start of a suspended imposition of sentence or at the start of probation. ARK. CODE ANN. § 12-12-917(e)(1)-(4).

By its assessment of a sex offender, Arkansas is publically predicting that the offender is a person likely to commit future crimes (low risk, moderate risk, high risk or sexually violent predator, depending on the assessment), and the government communicates its prediction to people throughout the community, including the offenders' neighbors. *Guidelines*, App. C at 80a-81a.

In making this assessment, State examiners consider "actuarial analyses, information obtained from interview, psychological testing and evaluation, review of relevant records and historical data, and [a] polygraph or penile plethysmograph." *Guidelines*, App. C at 79a. An offender is only entitled to access the "records and information generated and maintained by the [risk assessment] committee." ARK. CODE ANN. § 12-12-917(d)(2)(B)(ii). An offender may not see "restricted source documents of commercial psychological tests or working notes of staff," nor is the risk assessment committee required to show an offender "records and information generated by other agencies." ARK CODE ANN. § 12-12-917(d)(2)(A)(i)-(B)(ii).

In fact, an offender is only entitled to a list of the records and information obtained from other agencies by the risk assessment committee, not the records themselves. ARK. CODE ANN. § 12-12-917(d)(2)(B)(i)-(ii). Consequently, an offender's risk assessment may be conducted with information inaccessible to the offender.

The offender may appear before the risk assessment committee, but at that appearance the offender has limited rights. An offender may not have the assistance of counsel when meeting with the committee. An offender may not call witnesses. An offender may not confront the committee's witnesses. And an offender may not have the right to see all the documents relied upon by the committee. App. A at 16a; ARK. CODE ANN. § 12-12-917).

Although an offender may challenge the committee's finding in court, by that time the public notice has already been promulgated, and the after-the-fact judicial review is limited. The court can only reverse the committee's findings if they are "arbitrary and capricious" or otherwise unlawful. ARK. CODE ANN. § 25-15-212.

Subsequent to the enactment of the Registration Act, Arkansas passed ARK. CODE ANN. § 5-14-128. Under § 5-14-128, offenders assessed at Level 3 or 4 are forbidden from residing within two thousand feet of a school or day care, while offenders assessed at Level 1 or 2 face no residency restrictions.[2]

Believing that the Registration Act and its implementing regulations were unconstitutional violations of their liberty interests, Messrs. Weems and Briggs sued in federal court alleging, *inter alia*, violations of procedural due process. The

---

[2] If a Level 3 or Level 4 offender owned the property prior to the establishment of the school or daycare or prior to July 13, 2003 (the effective date of the statute), then he is not in violation of the statute unless he is subsequently found guilty of another sex offense. ARK. CODE ANN. § 5-14-128(b) and (c). Neither Mr. Weems nor Mr. Briggs can enjoy this exception as Mr. Weems rented and Mr. Briggs lived with his mother.

jurisdiction of the District Court was asserted under 28 U.S.C. § 1331.

The Respondents moved to dismiss for failure to state a claim; the trial court granted the motion and entered a Memorandum Opinion and Order on December 1, 2004. Messrs. Weems and Briggs filed their notice of Appeal on January 3, 2005, and the Eighth Circuit entered its decision on July 13, 2006. Petitioners timely filed their Petition for Rehearing and Rehearing *En Banc* which the Eighth Circuit denied on August 18, 2006.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. There is a split of authority regarding the requirements of procedural due process in assessing sex offenders: the Eighth Circuit's holding conflicts with several states and the Third Circuit

This case presents this question: Under the U.S. Constitution,[3] what are the minimal procedural due process protections required in risk or dangerousness assessments of sex offenders where the assessments are material to the application of regulatory statutes against sex offenders?

---

[3] Risk assessments of sex offenders are distinguishable from assessments made in other contexts in that sex offender assessments contemplate release from custody, community notification and residency restrictions *See e.g. Kansas v. Hendricks*, 521 U.S. 346 (1997) (involuntary civil commitments of violent sexual predators); *Schall v. Martin*, 467 U.S. 253 (1984) (juvenile pretrial detention);

The answer is uncertain as U.S. Constitutional due process requirements are different depending on the offender's jurisdiction.

Petitioners respectfully submit that federal constitutional jurisprudence should be consistent among the country's various jurisdictions, and for that reason this Court should grant certiorari to resolve the conflict.

Further, this Court seemed to anticipate the question presented here when it decided *Connecticut Department of Safety v. Doe*, 538 U.S. 1, 8 (2003) (implying that sex offenders could make a procedural due process challenge to registration and notification schemes if the facts to be established are material to the statutory scheme); *see State v. Guidry*, 96 P.3d 242, 251 (Haw. 2004) (commenting on the Court's decision in *Connecticut* that, "[l]ogically, then, it follows that due process would appear to require the opportunity to determine a fact that *is material* to a state's statutory scheme . . . .").

Under the Registration Act, the issue of a sex offender's risk or future dangerousness is material to the requirements to submit to an initial assessment, ARK. CODE ANN. § 12-12-902, and to the manner and scope at which community notification is conducted by the State, ARK. CODE ANN. § 12-12-913(c)(1)(A) - (2)(B)(iii). Moreover, a sex offender's future dangerousness is material to the places where he can reside in Arkansas. ARK. CODE ANN. § 5-14-128.

Greenholtz v. Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979) (parole board hearings); *Jurek v. Texas*, 428 U.S. 262 (1976) (sentence enhancements).

A. Basic procedural safeguards

1. According to the Eighth Circuit, it is constitutional for Arkansas to implement a system that denies offenders an attorney, confrontation of witnesses, or an opportunity to examine all the evidence against them.

There are no provisions within the Registration Act or the Sex Offender Guidelines and Procedures that allow a sex offender to be represented by an attorney, to confront witnesses, or to see all of the documentary evidence used in the initial assessment. App. A at 16a; Ark. Code Ann. (Sec) 12-12-917. Nor is he allowed such basic constitutional due process protections should he request an administrative review of the assessment. ARK. CODE ANN. § 12-12-922(b)(3)(B)(i)-(iii)[4].

---

[4] In its decision the Eighth Circuit stated that the Registration Act gives "full procedural guarantees set forth in the Arkansas Administrative Procedure Act." App. A at 16a. This statement by the Eighth Circuit is incorrect. The procedural "guarantees" of the Registration Act are found at ARK. CODE ANN. § 12-12-917 ("Evaluation Protocol"). The Act's Evaluation Protocol is quite different than the Administrative Procedure Act's procedural guarantees found at ARK. CODE ANN. § 25-15-201 *et seq*. Indeed, unlike the Registration Act, Arkansas's Administrative Procedure Act requires that litigants be allowed to have counsel, confront witnesses, and receive copies of the evidence to be used against them. *Compare* ARK. CODE ANN. § 12-12-917 *with* ARK. CODE ANN. § 25-15-213. In the realm of sex offender registration, Arkansas's Administrative Procedure Act only comes into play when an offender wants judicial review of the risk assessment committee's findings, and in those circumstances the scope of the judicial review is limited. *See* ARK. CODE ANN. § 25-15-212.

Nevertheless, the Eighth Circuit found that the Arkansas Registration Act affords constitutionally required procedural due process. App. A at 13a & 16a-17a.

2. Other jurisdictions constitutionally require the protections that Arkansas denies

In *Doe v. Poritz*, 662 A.2d 367 (1995), the New Jersey Supreme Court considered a procedural due process challenge to New Jersey's sex offender registration and notification statutes. New Jersey's scheme provided for a three tiered notification system which was tied to an offender's alleged risk of re-offense. *Poritz*, 662 A.2d at 378.

Under *Poritz*, constitutional due process required a judicial hearing prior to tier two or three notification. *Poritz*, 142 N.J. at 106-07, 662 A.2d at 421. In reaching this holding, the *Poritz* court relied on several cases that held that "fundamental fairness" required a litigant to be able to have counsel and examine the evidence against him. *See Poritz*, 662 A.2d at 421-22 citing *State v. Wingler*, 135 A.2d 468 (1957) (affording defendant opportunity to see and respond to diagnostic report from Adult Diagnostic and Treatment Center); *State v. Kunz*, 259 A.2d 895 (1969) (mandating that defendants are entitled to inspect presentence report and to be heard on any adverse contents); *Monks v. New Jersey State Parole Bd.*, 277 A.2d 193 (1971) (holding that a prisoner is entitled to a statement of reasons for denial of parole); and *Rodriguez v. Rosenblatt*, 277 A.2d 216 (1971) (holding that an indigent municipal court defendant subject to imprisonment or other "consequence of magnitude" such as loss of driving privilege is entitled to court-appointed counsel at no cost).

Doe v. Pataki, 3 F. Supp. 2d 456 (S.D.N.Y. 1998), enumerated the minimal due process rights that should be

afforded to sex offenders facing a "dangerousness" assessment. These rights included representation by counsel, prehearing discovery, and proof by the State of the facts supporting each risk factor by clear and convincing evidence. *See Doe v. Pataki*, 3 F. Supp. 2d at 470-71. New York adopted the *Doe v. Pataki* holding. *See, e.g., People v. David W.*, 733 N.E.2d 206 (2000).

The Oregon Supreme Court held that "due process requires notice and an evidentiary hearing" before the state declares a person to be a "predatory sex offender." *Noble v. Board of Parole and Post-Prison Supervision*, 964 P.2d 990 (1998).

Arkansas's assessment of a sex offender's future dangerousness is material under the Registration Act. The results of the assessment affect community notification and the offender's place of residence. Therefore, as intimated by this Court's decision in *Connecticut Department of Safety v. Doe*, the Petitioners should have been afforded a meaningful opportunity to challenge or rebut the presumption and prediction of future dangerousness created under the Act. They have been and are being denied this opportunity by the State of Arkansas and by the decision of the Eighth Circuit. Furthermore, the decisions of the lower courts in this case are in conflict with the cases cited above in regard to the adequacy of the procedures used to assess sex offenders.

Consequently, there is a genuine and urgent need for this Court to grant Certiorari to decide what process is due to a sex offender where a dangerousness assessment is material to the application of a regulatory scheme against the offender.

B. Burden of Proof / Burden of Persuasion

Prior to the Eighth Circuit's decision below, in the context of sex offender registration and notification laws, the burden of proof issue was divided into two camps: "preponderance" and "clear and convincing." All authorities agreed that the burden of persuasion was on the government.

1. State held to "preponderance of the evidence" standard

In the case of *Doe v. Sex Offender Registry Bd.*, 97 N.E.2d 512, 520 (1998), the Massachusetts Supreme Court held that the government had the burden of persuasion, and "preponderance of the evidence" was the level of proof necessary in a sex offender registration and notification scheme. The case of *J.J.F. v. State*, 132 P.3d 170, 181 (Wyo. 2006), agrees. The Wyoming Supreme Court held that procedural due process under the U.S. Constitution required only "preponderance of the evidence" in Wyoming's sex offender registration and notification scheme. *See also In re W.M.*, 851 A.2d 431 (D.C. 2004) (same).

2. State held to "clear and convincing evidence" standard

In *E.B. v. Verniero*, 119 F.3d 1077, 1111 (3rd Cir. 1997), the Third Circuit held that constitutional due process required a hearing in which "the prosecutor has the burden of persuasion and must prove her case by clear and convincing evidence." A New York federal district court agrees with *E.B. v. Verniero*. *See Doe v. Pataki*, 3 F. Supp. 2d at 470-71 (S.D.N.Y. 1998). *Doe v. Pataki* has been cited with approval in New York state cases. *See, e.g., People v. David W.*, 733 N.E.2d 206 (2000).

3. *There is no standard articulated in the judgment below*

The Eighth Circuit's upholding of Arkansas's Registration Act has created a third camp. The Arkansas Registration Act and its regulations are silent as to level of proof must be shown in a risk assessment. Indeed, the Act is silent as to who (the offender or the State) initially has the burden of persuasion.[5]

Thus, certiorari is also appropriate here to settle this question: In sex offender registration and notification schemes, which standard of proof does procedural due process require? Is it "preponderance," "clear and convincing," or unspecified?

CONCLUSION

The writ of certiorari should be granted to give guidance to the federal courts as to the requirements of due process under the United States Constitution in sex offender regulatory statutes that mandate determinations of a sex offender's future dangerousness.

---

[5] After the committee has assigned a risk level, the offender may challenge that determination. But in that challenge the burden of persuasion is on the **offender**. *See* ARK. CODE ANN. §§ 12-12-922(b); 12-12-917(g)(2)(B).

Respectfully Submitted,

Gregory T. Karber
C. Brian Meadors
Robert D. Kelly
Counsel of Record
PRYOR, ROBERTSON & BARRY, PLLC
315 North 7th Street
P.O. Drawer 848
Fort Smith, AR 72902-0848
(479) 782-8813 - Telephone
(479) 785-0254 - Facsimile

Attorneys for Petitioners

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-1152

Donald Weems; Michael Briggs,	*	
	*	
Plaintiffs/Appellants,	*	
	*	
Tony Allen Lampkin,	*	
	*	
Plaintiff,	*	
	*	
v.	*	
	*	
Little Rock Police Department,	*	
	*	
Defendant,	*	
	*	Appeal from the
Lawrence Johnson, In his official	*	United States
capacity as Chief of Police, Little	*	District Court
Rock Police Department,	*	for the Eastern
	*	District of
Defendant/Appellee,	*	Arkansas
	*	
Pine Bluff Police Department,	*	
	*	
Defendant,	*	
	*	
Daniel Moses, In his official capacity	*	
as Chief of Police, Pine Bluff Police,	*	
	*	

Defendant/Appellee, *

*

Arkansas Department of Correction, *
Sex Offenders Assessment Committee *
and Sex Offender Screening and Risk *
Assessment, *

*

Defendant, *

*

Larry B. Norris, In his official *
capacity as Director, Arkansas *
Department of Correction; Paula *
Stitz, In her official capacity as *
Chairperson of the Arkansas Sex *
Offenders Assessment Committee; *
G. David Guntharp, In his official *
capacity as Director of Arkansas *
Department of Community Correction; *
Sheri Flynn, In her official *
capacity as administrator of Sex *
Offender Screening and Risk *
Assessment (originally sued as John *
Doe), *

*

Defendants/Appellees. *

Submitted: October 10, 2005
Filed: July 13, 2006

Before RILEY, HANSEN, and COLLOTON, Circuit Judges.

COLLOTON, Circuit Judge.

Donald Weems and Michael Briggs, registered sex offenders living in Arkansas, brought this action pursuant to 42 U.S.C. § 1983. They challenged provisions of the Arkansas Sex Offender Registration Act that require sex offenders to register with the State as well as a criminal statute that prohibits certain registered sex offenders from living within two thousand feet of a school or daycare center. The district court[1] granted defendants' motions to dismiss for failure to state a claim and denied plaintiffs' motion for class certification. We affirm.

I.

In 1997, the Arkansas General Assembly enacted the Sex & Child Offender Registration Act. The General Assembly determined that "sex offenders pose a high risk of reoffending after release from custody," that "protecting the public from sex offenders is a primary governmental interest," that "the privacy interest of persons adjudicated guilty of sex offenses is less important than the government's interest in public safety," and that "the release of certain information about sex offenders to criminal justice agencies and the general public will assist in protecting the public safety." Ark. Code Ann. § 12-12-902. The Act, now titled the Sex Offender Registration Act, *id.* § 12-12-901, requires registration by any person adjudicated guilty of, or serving a sentence for, a "sex offense" as defined in § 12-12-903(12); any person who has committed a sex offense but was institutionalized or acquitted on grounds of a mental disease; and any person previously required to register under the Habitual Child Sex Offender Registration Act. *Id.* § 12-12-905(a). A person who sustained

---

[1] The Honorable Susan Webber Wright, Chief Judge, United States District Court for the Eastern District of Arkansas.

a conviction for a sex offense in another State and subsequently moved to Arkansas is likewise required to register. *Id.* § 12-12-906(a)(2)(A). Sex offenders required to register must provide name and address, employment information, a statement of the crime or crimes committed, and other demographic data. *Id.* § 12-12-908(b).

In 1999, the legislature amended the Sex Offender Registration Act to provide for the establishment of a Sex Offender Assessment Committee, a committee appointed by the governor and charged with "promulgat[ing] guidelines and procedures for the disclosure of relevant and necessary information regarding sex offenders to the public." *Id.* § 12-12-913(c)(1)(A); *see id.* § 12-12-921. The guidelines and procedures are to regulate the scope of information disclosed to the community, depending upon the sex offender's level of dangerousness, the sex offender's pattern of offending behavior, and the extent to which the information will enhance community safety. *Id.* § 12-12-913(c)(2)(B).

The 1999 Amendments also require sex offenders to undergo a risk assessment designed to predict future risk that the offender will recidivate. The Committee is charged with identifying "factors relevant to a sex offender's future dangerousness and likelihood of reoffense or threat to the community." *Id.* § 12-12-913(c)(2)(A). The guidelines promulgated by the Committee define four levels of risk: low, moderate, high, and sexually violent predator. *The Sex Offender Guidelines & Procedures for Implementing Risk Assessment & Cmty. Notification Regarding Sex Offenders*, at 13-14 (hereafter "*Guidelines*"), *reprinted in* J.A. at 50-51. The Guidelines provide for broader disclosure of information to the public as the risk level increases. *Id.* at 19-21.

Examiners performing risk assessments for sex offenders consider "actuarial analyses, information obtained from interview, psychological testing and evaluation, review of relevant records and historical data, and [a] polygraph or penile plethysmograph." *Id.* at 9. Using information gathered from the assessment, examiners determine the applicable level of risk, with one exception. Ark. Code Ann. § 12-12-917(b)(1), (e). Examiners do not have authority to categorize sex offenders as Level 4, sexually violent predators. This categorization can be made only by the sentencing court, *id.* § 12-12-918, with the examiner's role limited to providing a report recommending to the court whether to categorize the offender as a sexually violent predator. *Id.* § 12-12-917(a)(1).

Offenders may challenge their assigned risk level by submitting a written request for administrative review. *Id.* § 12-12-922(b)(1)(A). Under this procedure, the offender may request copies of all documents generated by the examiners, a listing of all documents that may be available from other agencies, and a copy of the tape of the interview. *Id.* § 12-12-922(b)(1)(B). A member of the Committee is assigned to conduct the administrative review within 30 days of receiving a request for review. *Id.* § 12-12-922(b)(6)(A). The member may set aside the assigned risk level if it is not supported by substantial evidence, if the governing rules and procedures were not properly followed, or if there is new information that has a bearing on the risk that the sex offender poses to the community. *Id.* § 12-12-922(b)(3)(B). Until administrative review is completed, notification to the community of an offender's assigned risk status shall be made "only at the level immediately below the level upon which review has been requested." *Id.* § 12-12-922(b)(5). Community notification commences five calendar days after the Committee mails the finding of the administrative review to the offender. *Id.* § 12-12-922(7)(A)(i).

If the administrative review does not alter the assigned risk level, the sex offender has the right to file a petition for judicial review in an Arkansas circuit court, pursuant to the Arkansas Administrative Procedure Act. *Id.* § 12-12-922(b)(7)(A)(ii). The filing of a petition does not automatically stay community notification, but the reviewing court "may do so upon such terms as may be just." Ark. Code Ann. § 25-15-212(c). The Arkansas APA provides that the court may reverse or modify the decision of the Committee if it is in violation of constitutional or statutory provisions, in excess of the agency's statutory authority, made upon unlawful procedure, affected by other error or law, not supported by substantial evidence in the record, or arbitrary, capricious, or characterized by abuse of discretion. *Id.* § 25-15-212(h).

In 2003, the Arkansas General Assembly enacted a residency restriction for Level 3 "high risk" offenders and Level 4 "sexually violent predators." Offenders in these classes are not permitted "to reside within two thousand feet (2,000') of the property on which any public or private elementary or secondary school or daycare facility is located." Ark. Code Ann. § 5-14-128(a). The statute excludes from the residency restriction any Level 3 or 4 offender residing in a property he owned and occupied before the school or daycare center opened or before July 16, 2003. *Id.* § 5-14-128(b)(1), (c)(1). But if an offender who satisfies one of the exceptions commits another sexual offense either after July 16, 2003, or after a new school or daycare center opens, he is no longer exempt. *Id.* § 5-14-128(b)(2), (c)(2). A sex offender who is required to register and knowingly violates the residency restriction is guilty of a Class D felony. *Id.* § 5-14-128(d).

Weems was found guilty of indecent exposure in Pulaski County, Arkansas, on March 7, 2000. Indecent exposure is a sex offense that subjects Weems to the registration and assessment requirements, and an examiner assessed Weems as a Level 3, high risk offender. After serving a one-year prison term, Weems moved into housing in Little Rock in May 2001. Weems received a letter dated February 28,2004, from the Chief of Police in Little Rock, advising him that he was in violation of the 2000-foot residency restriction, and ordering him to relocate.

Briggs was found guilty of first-degree rape in Hartford County, Maryland, in 1986. In March 2001, after serving fifteen years of his sentence, Briggs moved into his mother's house, located in Pine Bluff, Arkansas, and established permanent residence there. Pursuant to the Registration Act, Briggs registered and underwent a risk assessment, after which he was assessed as a Level 3 risk. On April 8, 2004, Briggs received notice that by living in his mother's home, he was in violation of the residency restriction and was required to relocate.

Weems and Briggs challenge the constitutionality of both the Registration Act and the residency restriction. They alleged in the district court that the statutes violate the doctrines of substantive and procedural due process. They also asserted that the Registration Act and Guidelines are unconstitutionally vague, that the residency restriction violates their equal protection rights by treating property owners and Level 1 and 2 sex offenders differently than non-property owning Level 3 and 4 offenders, and that the residency restriction violates their substantive due process rights to reside with family members and to unrestricted interstate and intrastate travel. They further alleged that the residency restriction is an unconstitutional *ex post facto* law that

retroactively punishes sex offenders who committed their crimes before July 16, 2003.[2]

The district court granted the defendants' motion to dismiss for failure to state a claim. Although it found that the plaintiffs' interests in their reputation and privacy are substantial, the district court, applying *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), held that the Due Process Clause does not require the State to extend the rights to counsel and to confront witnesses to the risk assessment process, and that Arkansas provided sufficient procedures. The court also concluded that the Registration Act is not unconstitutionally vague, that the residency restriction does not violate the equal protection rights of non-property owning Level 3 and 4 sex offenders, that the Act and residency restriction do not violate sex offenders' substantive due process rights, and that the residency restriction does not violate the *Ex Post Facto* Clause.

II.

We recently considered several issues raised by Weems and Briggs in connection with an Iowa statute that imposed a residency restriction for certain sex offenders. *Doe v. Miller*, 405 F.3d 700 (8th Cir.), *cert. denied*, 126 S. Ct. 757 (2005). In *Miller*, as relevant here, we held that an Iowa statute that included a 2000-foot residency restriction did not violate the substantive due process rights or right to intrastate travel of sex offenders, and did not constitute an unconstitutional *ex post facto* law. The Iowa statute differed from the Arkansas

---

[2] Weems and Briggs also asserted that the Registration Act was inconsistent with the Confrontation Clause of the Constitution. This contention is not raised on appeal.

law in two principal ways. The Iowa statute was narrower in that it applied only to offenders convicted of sex offenses against minors, while the Arkansas law applies to some sex offenses in which adults were victimized. The restrictions of the Iowa statute affected offenders more broadly, however, because they applied to every sex offender convicted of an enumerated offense, without any individualized assessment. As explained, the Arkansas statute provides for an administrative process to assign a risk level to each offender on a case-by-case basis. Despite these differences, the principles discussed in *Miller* are highly instructive with respect to several of the claims raised by Weems and Briggs in this case.

Like the sex offenders in *Miller*, Weems and Briggs assert that the Arkansas residency restriction violates their rights under the doctrine of substantive due process, because the statute, in their view, infringes on a constitutional right "to reside in a certain place, i.e., with family members." In *Miller*, we rejected a similar appeal to precedents involving "intimate human relationships," *see Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965), and concluded that a comparable residency restriction did not implicate any fundamental right of the sex offenders that would require strict scrutiny of the statute. *Miller*, 405 F.3d at 709-10. We reasoned that because the statute did not "operate directly on the family relationship," *id.* at 710, the residency restriction did "not infringe upon a constitutional liberty interest relating to matters of marriage and family in a fashion that requires heightened scrutiny." *Id.* at 711; *accord State v. Seering*, 701 N.W.2d 655, 663-65 (Iowa 2005); *see also Bowen v. Gilliard*, 483 U.S. 587, 598-603 (1987); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

Our holding in *Miller* controls the level of scrutiny applicable to the Arkansas residency restriction. Because the residency restriction does not infringe upon a "fundamental right," we consider only whether the statute rationally advances some legitimate government purpose. *Miller*, 405 F.3d at 714. The Arkansas legislature undoubtedly has a legitimate interest in protecting children from the most dangerous sex offenders, *see Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003), and we believe that a residency restriction designed to reduce proximity between the most dangerous offenders and locations frequented by children is within the range of rational policy options available to a state legislature charged with protecting the health and welfare of its citizens. *Miller*, 405 F.3d at 714-16. Indeed, Weems and Briggs rest their substantive due process argument entirely on the proposition that strict scrutiny should apply. We therefore conclude that the Arkansas statute does not contravene the doctrine of substantive due process.

Appellants next contend that the residency restriction violates the Equal Protection Clause of the Fourteenth Amendment because it treats non-property owning Level 3 and 4 sex offenders differently from property owners or Level 1 and 2 offenders. They argue that the residency restriction interferes with a "fundamental right to acquire, enjoy, own and dispose of property," such that it is subject to strict scrutiny. The district court concluded that as long as the statute was rationally related to a legitimate state interest, the residency restriction did not deprive appellants of the equal protection of the laws.

We agree with the district court that the rational basis standard of review applies to this equal protection claim. The distinctions drawn by the Arkansas statute are not based on a suspect classification such as race or religion, *cf. Shelley v.*

Kraemer, 334 U.S. 1 (1948), and the statute does not implicate a "fundamental right" under equal protection jurisprudence, such as the right to vote. *Cf. Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626-27 (1969). Outside of these two categories, rationality review governs statutory classifications based on property ownership. *See Nordlinger v. Hahn*, 505 U.S. 1, 10-11 (1992); *WMX Technologies, Inc. v. Gasconade County, Mo.*, 105 F.3d 1195, 1198-99 (8th Cir. 1997). For reasons previously discussed, we further agree with the district court that the residency restriction applied to high risk offenders and sexually violent predators is rationally related to the State's legitimate interest in protecting the safety of children. *See Miller*, 405 F.3d at 714-16.

Weems and Briggs also contend that the residency restriction infringes on a constitutional right to intrastate travel. We rejected an identical contention in *Miller*, where we held that even assuming such a right is recognized, it would not be implicated by a residency restriction for sex offenders. *Id.* at 713. We observed that the Iowa residency restriction did not "prevent a sex offender from entering or leaving any part of the State," and it did not "erect any actual barrier to intrastate movement." *Id.*

Appellants contend that the Arkansas law is more restrictive than the Iowa statute, because the Registration Act defines "residency" to include "place of employment, training, or education." Ark. Code Ann. § 12-12-903(10)(B). A sex offender must register if he "establishes residency" in Arkansas. Thus, if a sex offender lives in a neighboring State, but works or attends school in Arkansas, then the offender must comply with the Registration Act. This requirement serves the purpose of notifying the community that a sex offender is within a particular municipality or county on a regular basis.

The definition of "residency" for purposes of registration in section 12-12-903(10)(B), however, appears in a different chapter of the Arkansas Code than the residency restriction, and the definition does not by its terms apply to the criminal statute that makes it unlawful for a sex offender "to reside" within 2000 feet of a school or daycare facility. Ark. Code Ann. § 5-14-128(a). Chapter 5 does not define the term "reside," and we do not assume that the General Assembly and the Governor necessarily intended to apply the broad definition of "residency" when crafting a restriction on where a sex offender may "reside." There is no indication in this record that the State has moved to enforce the residency restriction to prohibit sex offenders from working or studying within 2000 feet of a school or daycare center, and we see no good reason to create more difficult constitutional questions by adopting a broad construction that the State itself eschews. We thus employ the normal rule that termsare given "their ordinary and usually accepted meaning," *Williams v. State*, 67 S.W.3d 548, 556 (Ark. 2002), and we construe "reside" to mean "to dwell permanently or continuously." *Webster's Third New International Dictionary* 1931 (2002). On this understanding, the residency restriction in Arkansas is no broader than the restriction at issue in *Miller*, and for the same reasons discussed there, we conclude that the Arkansas law does not infringe on a constitutional right to intrastate travel. 405 F.3d at 713.

Weems and Briggs also argue that the Arkansas residency restriction constitutes an unconstitutional *ex post facto* law as applied to offenders who sustained convictions prior to the enactment of the statute. We addressed this same argument in *Miller*, and concluded that Iowa's residency restriction was not so punitive in purpose or effect to negate the legislature's intent to create a civil, non-punitive regulatory scheme. 405 F.3d at 718-23; *accord Seering*, 701 N.W.2d at 667-69.

As with the Iowa law, we conclude that the Arkansas General Assembly intended to create a civil, non-punitive regulatory scheme when it enacted the residency restriction. The General Assembly first passed the Registration Act, finding specifically that "protecting the public from sex offenders is a primary governmental interest," and that the "release of certain information about sex offenders to criminal justice agencies and the general public will assist in protecting the public safety." Ark. Code Ann. § 12-12-902. The Supreme Court of Arkansas then held that the General Assembly's intent in enacting the Registration Act was to protect public safety, and not to punish sex offenders. *Kellar v. Fayetteville Police Dep't*, 5 S.W.3d 402, 407 (Ark. 1999). The residency restriction was enacted as part of a bill relating to sex offender registration, including amendments to the Registration Act, 2003 Ark. Acts 330, and it works in tandem with the registration requirement. By its terms, the residency restriction applies to certain offenders who are "required to register under the Sex Offender Registration Act," and who are classified as "high risk" or "sexually violent predators" under the Act and Guidelines. Ark. Code Ann. § 5-14-128(a). As in *Miller*, we believe that the available evidence leads most naturally to the inference that the residency restriction, like the registration requirements, were intended to protect the public safety, and that the purpose of the Arkansas General Assembly was regulatory and non-punitive. *See Miller*, 405 F.3d at 719.

In considering whether the Arkansas residency restriction is nonetheless so punitive in effect as to negate the legislature's intent to create a civil, non-punitive regulatory scheme, we believe that Arkansas law is on even stronger constitutional footing than the Iowa statute. Unlike the Iowa law, the Arkansas statutory plan calls for a particularized risk assessment of sex offenders, which increases the likelihood

that the residency restriction is not excessive in relation to the rational purpose of minimizing the risk of sex crimes against minors. This fine-tuning of the restriction addresses the principal concern of the dissenting judges who believed the Iowa statute violated the *Ex Post Facto* Clause. *Miller*, 405 F.3d at 725-26 (Melloy, J., concurring and dissenting); *Seering*, 701 N.W.2d at 672 (Wiggins, J., concurring in part anddissenting in part). Because the other factors in the *ex post facto* analysis here are comparable to those discussed in *Miller*, 405 F.3d at 719-21, and the "rational connection" of the residency restriction is even closer to a nonpunitive purpose, we conclude that the Arkansas statute is not an unconstitutional *ex post facto* law.

Finally, citing the distinctions among sex offenders based on the assessment of risk levels, Weems and Briggs raise a procedural due process challenge to theArkansas statute and guidelines. They contend that the risk assessment determination and the resulting notification to the community deprive them of a liberty interest without due process of law. Assuming for purposes of analysis that appellants have a constitutionally-protected liberty interest in avoiding the risk assessment and its consequences, either by virtue of the Fourteenth Amendment or by creation of state law, we conclude that the procedures established by Arkansas are adequate. Considering the private interest affected by the State's actions, the risk of erroneous determinations under current procedures and the probable value of any additional safeguards, and the State's interest in risk assessment and community notification, including the fiscal and administrative burdens of additional procedures, *see Mathews v. Eldridge*, 424 U.S. at 335, we hold that the existing procedures comport with theConstitution.

Before a team operating under the oversight of the Sex Offender Assessment Committee may assign a risk level to an offender, the team conducts a thorough review of official records and historical data, performs psychological testing and evaluation, undertakes actuarial analyses, and conducts a personal interview with the offender. The offender has an opportunity to be heard through the interview, and may access most records and information maintained by the committee. Ark. Code Ann. § 12-12-917(d)(2)(A). The examination team typically follows an actuarial prediction model based on objective criteria, but the Guidelines do permit "some flexibility" to account for "special circumstances" of a particular case that are not adequately considered in the model. These "overrides" and "departures" permit the examiners to increase or decrease the assigned level based on special circumstances. *Guidelines*, at 14-15. Any such adjustment must be "fully documented," and it is subject to review by the Sex Offender Assessment Committee. *Id.* at 15.

The State has a strong interest in protecting children from dangerous offenders through a process that is efficient and practical. While sex offenders have an interest in avoiding inaccurate community notification or an unwarranted residency restriction, the Guidelines do not permit notification of a "high risk" assessment, which triggers the residency restriction and may bring greater opprobrium than notification in accordance with Level 1 or 2 status, until after the conclusion of an administrative review.[3] Prior to this review,

---

[3]The residency restriction applies to a sex offender after he "has been assessed" as a Level 3 or Level 4 offender. Ark. Code Ann. § 5-14-128(a). The statute is indefinite about when, in the course of the assessment process, an offender should be deemed "assessed." Because the applicability of the residency restriction is defined with reference to the requirements of the Registration Act,

the risk of erroneous deprivation is negligible. Although examiners believe that the offender is a "high risk," the community may be notified only that the offender presents a "moderate risk," and the offender's criminal record – which almost certainly implies at least some level of risk – is already a matter of public record. The administrative review then ensures that the sex offender's assessment is considered by both the examination team and the Sex Offender Review Committee before a Level 3 assessment is implemented.

Weems and Briggs complain primarily that the procedures do not afford the "rigors of an adversarial process," including a right to counsel and to confront witnesses against them, and that the risk assessment process includes "undefined and non-specific overrides and departures." We are not persuaded that these features make the process constitutionally inadequate. The Committee's assessment is designed to be thorough and complex, drawing on historical records, psychological evaluations, and actuarial techniques. Deviations from the actuarial prediction models are designed to be "used sparingly," only with the approval of "senior clinical staff," and are subject to review by the Sex Offender Assessment Committee. *Guidelines*, at 14-15. These "overrides" and "departures" are not necessarily unfavorable to an offender; they may either increase or decrease the risk level assigned. Given the difficulty of predicting human behavior and the

---

we think the better reading is that the restriction does not take effect until community notification at Level 3 is authorized under the Registration Act. This interpretation is consistent with the State's representation to the district court that "there is nothing preventing a person appealing a level 3 assessment from residing near a school or daycare while . . . an appeal is pending." (State Def's Br. in Supp. of Mot. to Dismiss Am. Compl., at 14; J.A. at 364).

numerous variables that may influence a professional's predictive judgment in a particular case, we do not think the authority to vary from the actuarial models or the absence of a precise listing of circumstances that will justify a variance are unconstitutionally vague or otherwise inconsistent with -15-the tenets of procedural due process. Indeed, it is just as likely that the flexibility to consider individual circumstances in special cases, rather than to follow a rigid actuarial model in every case, actually *reduces* the risk of an erroneous deprivation.

Nor do we believe that a right to counsel or to confront witnesses at the initial assessment stage is constitutionally mandated. Given the focus of the process on psychological evaluations and clinical judgments, it is unlikely that those procedural mechanisms would appreciably reduce the risk of an erroneous determination, while they would entail rather significant fiscal and administrative burdens. *See Bohn v. County of Dakota*, 772 F.2d 1433, 1438-39 (8th Cir. 1985). The Registration Act does provide for an adversarial judicial review of the Committee's administrative review decision, with the full procedural guarantees set forth in the Arkansas Administrative Procedure Act. Ark Code Ann. §§ 12-12-922(b)(7)(A)(ii); 25-15-212(f), (g).

We recognize that under amendments to the Registration Act approved in April 2006, judicial review is not available until after community notification and the residency restriction have taken effect for offenders assessed at Level 3. 2006 Ark. Acts 1st Extraordinary Sess. 4. Nonetheless, the Due Process Clause does not require that all procedural protections be afforded prior to a deprivation, *see Parratt v. Taylor*, 451 U.S. 527, 540 (1981), and we believe that the combination of *ex ante* procedures (initial assessment and administrative review) and *ex post* procedures (judicial review) are sufficient

to satisfy the requirements of due process. *See Bohn*, 772 F.2d at 1438- 39. The offender is entitled to one layer of review before the Level 3 assessment is put into effect, and this administrative review by the Committee reduces the risk of erroneous determination by the examiners. The State has a strong interest in the protection of children from sex offenders who are likely to recidivate, and the delay in notification and residency restriction that would be required to await completion of judicial review thus impairs the State's legitimate interests. Under the flexible *Mathews* factors, we believe that the procedural avenues afforded by the Arkansas statutes are constitutionally adequate. The Arkansas statute and guidelines provide notice to sex offenders of the risk assessment process and give them a meaningful opportunity to be heard. The program adequately balances the substantial interests of the State in protecting children and the interests of the offenders in avoiding an erroneous risk assessment, while providing reasonable procedures designed to ensure an accurate classification. We hold that the statutes and guidelines are consistent with the Due Process Clause.

* * *

For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX B

IN THE UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

DONALD WEEMS and MICHAEL BRIGGS,	*	
	*	
Plaintiffs,	*	
	*	
vs.	*	No. 4:04CV 00514 SWW
	*	
LITTLE ROCK POLICE DEP'T, ET AL.,	*	
	*	
Defendants.	*	

Memorandum Opinion and Order

Plaintiffs[1] file this compliant on May 21, 2004, alleging that certain state statues relating to sex offenders violate the United States and Arkansas Constitutions. Along with their complaint, plaintiffs filed a motion for class action and a motion for preliminary injunction. At a hearing on the motion for preliminary injunction on May 27, 2004, the parties reached an understanding regarding the enforcement

---

[1] Tony allen Lampkin was a named plaintiff but he died on or about August 1, 2004, and his name was stricken from the action. *See* docket entry 59.

of the challenged statute that concerns a residency restriction, pending resolution of the case on the merits. At the Court's direction, defendants filed responses to plaintiff' motion for preliminary injunction. Defendants also filed motions to dismiss to which plaintiffs responded; plaintiffs also filed an amended complaint.[2] In light of the amended complaint, defendants supplemented their motions to dismiss and plaintiffs responded to those supplemental motions. For the reasons stated below, the Court finds the motions to dismiss should be granted.

Background

In 1997, the Arkansas General Assembly passed the Sex and Child Offender Registration Act ("Registration Act").[3] The Registration Act, codified at Ark. Code Ann. §§ 12-12-901 - 922 (Repl. 2003), has been amended several times, most recently in 2003 by Ark. Act 21, which went into effect on June 3, 2004.[4] The Registration Act requires individuals convicted of various sex offenses to register with the State as sex offenders and to submit to an assessment for the purpose of being classified according to the risk they pose to the public. After registration and assessment, the public is given

---

[2] In their amended complaint, plaintiffs state they are not seeking any further preliminary relief than that contained in the Agreed Order entered June 1, 2004. *See* docket entry 8. The Court thus finds plaintiffs' motion for injunctive relief (docket entry 2) is granted in part and denied in part as moot.

[3] The Act was amended in 2001 and deleted "and Child" following "Sex."

[4] References to the Registration Act will include the provisions of the statute as amended by Act 21.

notice that the individual is a sex offender. the extent of the public notification depends on the level of danger posed by an offender, which is indicated by his risk classification.

Upon being found guilty of a sex offense covered by the Registration Act, state sentencing courts are required to indicate in their judgments whether offenders are required to register. Ark. Code Ann. § 12-12-906(a)(1)(A). the Act requires the Arkansas Department of Correction ("ADC") and the Department of Community Correction ("DCC") to ensure that offenders under their supervision who are required to register do so. Ark. Code Ann. § 12-12-906(a)(1)(B) & (C). In addition, the Arkansas Department of Finance and Administration's Office of Driver Services is required to provide notice of the obligation to register in connection with the issuance of driver's licenses and identification cards. Ark. Code Ann. § 12-12-916. To register, offenders must fill out a form, providing such information as name, date of birth, address, driver's license number, social security number, place of employment, date of arrest, and offense of conviction. Ark. Code Ann. § 12-12-908. That information is then reported to the Arkansas Crime Information Center for entry in its records. Ark. Code Ann. § 12-12-907(a)(1) & (2).

Sex offenders are informed of their obligation to submit to an assessment when they are registering. Ark. Code Ann. § 12-12-906(c)(1)(A)(i). the assessments are performed by the Sex Offender Screening and Risk Assessment ("SOSRA"), a department within the ADC. Ark. Code Ann. § 12-12-1303. The Sex Offenders Assessment Committee ("SOAC") has oversight responsibility for the assessments, Ark. Code Ann. § 12-12-917(b), and has promulgated guidelines and procedures for the assessments pursuant to Ark. Code Ann. § 12-12-913(c). The guidelines "identify factors relevant to a sex offender's future dangerousness and likelihood of

BEST AVAILABLE COPY

reoffense or threat to the community[,]" Ark. Code Ann. § 12-12-913(c)(2)(A), and "address the extent of the information to be disclosed and the scope of the community to whom disclosure shall be made as these factors relate to the: (i) Level of the offender's dangerousness; (ii) Sex offender's pattern of offending behavior; and (3) Need of community members for information to enhance their individual and collective safety." Ark. Code Ann. § 12-12-913(c)(2)(B).

The assessment involves: 1) a thorough review of official records pertaining to the sex offenses and other criminal history; 2) psychological tests as deemed necessary; 3) a face-to-face interview; and 4) any other methods that the assessment team deems necessary to accurately assess the offender's risk of re-offending. State Defs.' Br. in Supp. Mot. to Dismiss Am. Compl., Ex. F ("*Guidelines*") at 9. The Registration Act sets out the following non-exclusive list of records and documents to be made available for the assessment: police reports; statements of probable cause; pre-sentence investigations and reports; complete judgments and sentences; current classification referrals; criminal history summaries; ;violation and disciplinary reports; all psychological evaluations and psychiatric hospital reports; sex offender or sexually violent predator treatment program reports; juvenile court records; victim impact statements; investigation reports to the State's child abuse hotline; and statements of medical providers treating victims of sex offense indicating the extent of injury to the victim. Ark. Code Ann. § 12-12-917(c)(2) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)).

Based on the historical data and information obtained during the assessment, offenders are assigned to one of four risk levels to the general public. Level 1 is low risk; level is

moderate risk; level 3 is high risk; and level 4 is considered a sexually violent predator. *Guidelines* at 18. If an offender voluntarily terminates the assessment process, is shown by substantial evidence to be deceptive during the assessment process, or fails to report for assessment as required, he or she will be assigned the risk assessment level of 3. Ark. Code Ann. § 12-12-917(b)(4)(B)(ii)(a); *Guidelines* at 18.

Higher risk levels lead to more widespread notice to the public that the individual is a sex offender. *Guidelines* at 25-27. Offenders may request reassessment by SOSRA every five years after their initial assessment. Ark. Code Ann. § 12-12-917(h) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)); *Guidelines* at 3-4. Under certain circumstances, offenders may apply to the sentencing court for an order terminating the obligation to register fifteen (15) years after their release from incarceration or fifteen (15) years after they were placed on probation. Ark. Code Ann. § 12-12-919.

The information acquired during registration and the offender's risk level is sent to the appropriate law enforcement agency for the purpose of facilitating public notification. Ark. Code Ann. §§ 12-12-917(f) & -922(b)(4)(A) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)). An offender's failure to register, cooperate during the assessment process, or report subsequent changes of address, employment, education, or training constitutes a class D felony. Ark. Code Ann. § 12-12-904.

Subsequent to the determination of risk level, level 1, 2, and 3 offenders may request an administrative review of the assessment. the review is conducted by a member of the SOAC. Ark. Code Ann. §§ 12-12-917(g)(2)(A) & -922(b) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)); *Guidelines* at 3, 20,21. If SOAC receives a request for administrative

review, community notification may be made only at the level immediately below the assessment level that is the subject of the review. Ark. Code Ann. § 12-12-922(b)(5) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)). Act 21 (2nd Ex. Sess.)). SOAC may amend the offender's assessment level upon a finding that the rules and procedures were not followed during the assessment, that relevant information exists that was not available at the time of the assessment, or that the assessment was not supported by substantial evidence. Ark. Code Ann. § 12-12-922(b)(3)(B) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)).

Pursuant to Ark. Code Ann. § 12-12-922(7)(A)(ii) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)), once the administrative review is exhausted, offenders assessed at levels 1, 2, and 3 may appeal their assessment by filing a petition in an appropriate state circuit court pursuant to the Arkansas Administrative Procedure Act, which is codified at Ark. Code Ann. § 25-15-201 *et seq.*. SOAC then transmits the record to circuit court. ARK. CODE ANN. § 25-15-212(d)(1). The court confines the review to the record and conducts it without jury, except that testimony may be taken in cases of alleged irregularities in the procedure before SOAC not shown on the record. Ark. Code Ann. § 25-15-212(g). Upon request, the court will hear oral argument and receive written briefs. *id.* The court may affirm SOAC's decision or remand the case for further proceedings. Ark. Code Ann. § 25-15-212(h). If the substantial rights of the offender have been prejudiced, the court may reverse or modify the decision by ruling that SOAC's findings, inferences, conclusions, or decisions are: "(1) In violation of constitutional or statutory provisions; (2) In excess of the agency's statutory authority; (3) Made upon unlawful procedure; (4) Affected by other error or law; (5) Not supported by substantial evidence of record; or (6) Arbitrary,

capricious, or characterized by abuse of discretion." *Id.* Community notification continues at the level immediately below the level that is the subject of the appeal during the circuit court proceedings, but is made at the level approved by the circuit court once it makes its decision. Ark. Code Ann. § 12-12-922(b)(9) & (10) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)).

The sentencing court, not the SOSRA or SOAC, determines whether a person is designated as a level 4 offender. That determination can follow one of two tracks. The first begins when a prosecutor alleges in the felony information that a defendant is a sexually violent predator. Ark. Code Ann. § 12-12-918(a)(1). If the defendant is found guilty, the court enters an order directing an examiner qualified by SOAC to issue a report recommending whether the defendant should be classified as a sexually violent predator. Ark. Code Ann. § 12-12-918 (a)(2)(A). The report is forwarded to the prosecutor and defense attorney, but it is not admissible for purposes of sentencing. Ark. Code Ann. § 12-12-918(a)(2)(B) & (C). After sentencing, the court determines whether the defendant will be classified as a sexually violent predator. Ark. Code Ann. § 12-12-918(a(3).

The second track begins during an assessment of a person convicted of an applicable offense who was not alleged to be a sexually violent predator. In such cases, if the SOSRA finds evidence that the person meets the criteria for a sexually violent predator, then SOAC shall bring that information to the prosecutor's attention. Ark. Code Ann. § 12-12-918(c)(1). The prosecutor will then decide whether to petition the sentencing court for a finding that the person is a sexually violent predator. *Id.* Sentencing courts retain jurisdiction to determine whether a defendant is a sexually violent predator for one year after sentencing or for so long as the defendant

remains incarcerated for the sex offense. Ark. Code Ann. § 12-12-918(c)(2).

In the event of either the first or second track being followed, the defendant may appeal SOSRA's recommendation to SOAC. Ark. Code Ann. § 12-12-917(g)(2)(A) & -922(b) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)). The defendant may also appeal the sentencing court's decision to Arkansas' appellate courts.

Arkansas Code Annotated § 5-14-128 ("Residency Restriction") prohibits Level 3 and Level 4 sex offenders from residing within 2000 feet of a school or day care facility. Violation of the statute is a class D felony. Arkansas Code Annotated § 5-14-128(d). It is a defense if the sex offender owned and occupied his residence before the school or day care facility was established. Arkansas Code Annotated § 5-14-128(b)(1). It is also a defense if the sex offender resided on property he or she owned prior to July 16, 2000. Arkansas Code Annotated § 5-14-128(c)(1).

Plaintiffs were required to register as sex offenders, underwent sex offender screenings and risk assessments, and were assessed as level 3 offenders. Plaintiff Weems was charged and convicted of indecent exposure to a minor, a class A misdemeanor. He was sentenced to and served one year in prison. He was released in March 2001 and subsequently secured residency in a public housing facility located in Little Rock, Arkansas. On February 28, 2004, separate defendant Lawrence Johnson, Chief of the Little Rock Police Department, notified Weems that he was in violation of the Residency Restriction and ordered him to relocate. Plaintiff Briggs was convicted of 1st degree rape in Maryland and sentenced to two life terms plus fifteen years. After serving twelve and one-half years in Maryland, Briggs

obtained a hearing for post-conviction relief. Prior to the hearing, he was offered a 22-year sentence in exchange for dropping his request for post-conviction relief. Subsequently, Briggs was released on probation and allowed to relocate to Arkansas in 2001 to live with his mother in Pine Bluff. On April 8, 2004, separate defendant Daniel Moses, Chief of the Pine Bluff Police Department, notified Briggs he had thirty days to relocate or be in violation of the Residency Restriction.

Plaintiffs seek to represent a class of sex offenders who are required to register and be assessed under the Registration Act and the subclass of offenders who have been classified as level 3 or level 4 offenders under the Act and who are subject to the residency restriction contained in Act 330, § 3, Arkansas Act of 2003, codified at Arkansas Code Annotated § 5-14-128.

Discussion

Plaintiffs claim the Registration Act and the Residency Restriction violate the Constitutions of the United States and Arkansas. Defendants argue plaintiffs' allegations fail to state a claim for relief and their complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). they also assert that because there is a parallel challenge to the Registration Act pending in state court, the Court should abstain from exercising jurisdiction over this lawsuit.

1. Abstention

Defendants argue this Court should decline to exercise its jurisdiction in this case because there is a parallel state court proceeding. They point out that on June 12, 2003, plaintiffs' counsel filed a lawsuit in Pulaski County, Arkansas Circuit

Court, *Roe v. Arkansas Dep't of Corrections, et al.*, No. CV-2003-6565, challenging the constitutionality of the Registration Act. In that lawsuit, Roe seeks judicial review of a decision by the SOSRA to classify him as a level 3 sex offender. In December 2003, he filed an amended petition challenging the constitutionality of the Registration Act and asking the court to enjoin enforcement of the Act.

"The existence of jurisdiction usually compels its exercise. The Supreme Court has noted a 'virtually unflagging obligation' on the part of federal courts to exercise their jurisdiction." *Missouri ex rel. Nixon v. Prudential health Care Plan, Inc.*, 249 F.3d 949, 952 (8th Cir. 2001). The Supreme Court has, however, identified certain circumstances in which federal courts must abstain and refuse to decide cases that are properly within their jurisdiction. The two primary abstention doctrines are those set out in *R. R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941) and in *Younger v. Harris*, 401 U.S. (1971). *See Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471 (1977). In *Colorado River Conservation Dist. v. United States*, 424 U.S. 800 (1976), the Supreme Court recognized that under truly exceptional circumstances, federal courts may abstain out of deference to pending state court proceedings. The Supreme Court noted that "the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention." *Id.* at 818. Citing *Colorado River*, defendants assert the Court should abstain from exercising its jurisdiction in order to avoid duplicative litigation. In additions, separate defendant Moses argues the Court should abstain under the *Pullman* doctrine.

The "exceptional circumstances" test of *Colorado River*, as expanded by the Supreme Court in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp*, 460 U.S. 1 (1983), requires consideration of six factors: (1) the inconvenience of the federal forum; (2) the desirability of avoiding piecemeal litigation; (3) the order in which jurisdiction was obtained by the courts; (4) the source of the governing law; (5) the adequacy of the state court action to protect the rights of the parties; and (6) the relative progress of the state and federal actions. *Darsie v. Avia Group Int'l, Inc.*, 36 F.3d 743, 745 (8th Cir. 1994) (citing *Colorado River* and *Cone*). The weighing of these factors is directed toward determining whether exceptional circumstances exist justifying the federal court's surrender of jurisdiction – not toward finding some substantial reason for the exercise of the federal court's jurisdiction. *Cone*, 460 U.S. at 25-26. The federal court must, however, remain mindful "that the balancing test is to be applied in a pragmatic, flexible manner with a view to the realities of the case at hand." *Darsie*, 36 F.3d at 745 (internal quotation omitted). Thus, this Court must consider whether there exist exceptional circumstances justifying abstention in favor of the state court action.

"The Supreme Court cases make it clear that this [the desirability of avoiding piecemeal litigation] is the predominant factor." *Federated Rural Elec. Ins. Corp. v. Arkansas Elec. Coops., Inc.*, 48 F.3d 294, 297 (8th Cir. 1995) (citing *Cone*). Policies underlying *Colorado River* abstention include wise judicial administration, conservation of judicial resources, and comprehensive disposition of litigation. *Id.* at 298. The Eighth Circuit has stated: "Our cases have advanced this policy by favoring the most complete action." *Id. See, e.g., USF&G Co. v. Murphy Oil USA, Inc.*, 21 F.3d 259, 263 (8th Cir. 1994) (affirming stay of federal proceedings where state action, unlike federal action, included all parties

in a declaratory judgment action involving multiple insurers and overlapping coverage).

The Court notes that the state court proceeding addresses on the Registration Act while the action before this Court challenges the Residency Restriction as well. There is nothing to suggest that the federal forum is inconvenient, and while the state court action was filed in June 2003, almost a year before the federal complaint, this alone does not counsel in favor of abstention. *See Cone*, 460 U.S. at 21; *USF&G*, 21 F.3d at 263. Rather, it is more appropriately weighed in conjunction with the Court's analysis of the sixth factor – the relative progress of the state and federal actions. There are pending motions for summary judgment in the state action; there a pending motions to dismiss in the federal action. The Court finds the "source of the governing law" factor favors exercising jurisdiction and the "adequacy of the state forum to protect the rights of the parties" factor is neutral. The Court finds that the desirability of avoiding piecemeal litigation and considerations of wise judicial administration weigh in favor of this Court exercising its jurisdiction.

Separate defendant Moses cites the *Pullman* abstention doctrine to support his request for the Court to abstain from exercising its jurisdiction. Under *Pullman*, the Supreme Court acknowledged that federal courts may exercise their "wise discretion" to abstain from a case if a parallel state suit may resolve the federal question. 312 U.S. at 501. The Eighth Circuit has stated: "Pullman requires a federal court to refrain from exercising jurisdiction when the case involves a potentially controlling issue of state law that is unclear, and the decision of this issue by the state courts could avoid or materially alter the need for a decision on federal constitutional grounds." *Moe v. Brookings County, South Dakota*, 659 F.2d 880, 883 (8th Cir. 1981).

> The paradigm of the 'special circumstances' that make abstention appropriate is a case where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question. Abstention in such circumstances not only serves to minimize federal-state friction, but also avoids premature and perhaps unnecessary constitutional adjudication. But the doctrine of abstention 'contemplates that deference to state court adjudication only be made where the issue of state law is uncertain.' Where, on the other hand, it cannot be fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication, abstention would amount to shirking the solemn responsibility of the federal courts to 'guard, enforce, and protect every right granted or secured by the constitution of the United States.'

Kusper v. Pontikes, 414 U.S. 51, 54-55 (1973) (citation omitted). Separate defendant Moses argues the state court's resolution of the constitutionality of the Registration Act may render plaintiffs' federal attack on the Residency Restriction moot and the state court may well interpret the Registration Act in such a way as to avoid or render unnecessary federal judicial review of the Act. The Court finds the present case does not fall within this category of abstention. The state law in question is not unclear nor is it fairly susceptible of an interpretation that would avoid the need for a decision on constitutional grounds. *See Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971) ("[w]here there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim").

2. Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(6)

In deciding a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), all facts alleged in the complaint are assumed to be true. *Doe v. Northwest Bank Minn., N.A.*, 107 F.3d 1297, 1303-04 (8th Cir. 1997). The complaint must be reviewed in the light most favorable to the plaintiff, *McMorrow v. Little*, 109 F.3d 432, 434 (8th Cir. 1997), and should not be dismissed unless it is clear beyond doubt that the plaintiff can prove no set of facts thereunder which would entitle him or her to relief. *Hafley v. Lohman,* 90 F.3d 264, 266 (8th Cir. 1996). The Court may grant a motion to dismiss on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

A motion to dismiss is not a device for testing the truth of what is asserted or for determining whether the plaintiff has any evidence to back up what is in the complaint. *ACLU Foundation v. Barr*, 952 F.2d 457, 467 (D.C. Cir. 1991). The issue is not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claims, irrespective of a judge's disbelief of a complaint's factual allegations or a judge's belief that the plaintiff cannot prove what the complaint asserts. *Id. See also Hickman v Tosco Corp.*, 840 F.2d 564, 565 (8th Cir. 1988); *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982). Thus, a motion to dismiss should be granted "as a practical matter . . . only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984))

a. Constitutionality of the Registration Act

Plaintiffs assert that the Registration Act violates their liberty interests "by the absence of due process at any stage through the implementation of a statutory and regulatory scheme that is unconstitutionally void for vagueness." Am. Compl., ¶ 18-19. They also claim the Registration Act violates their rights under the Sixth Amendment to confront witnesses against them and to a trial by jury.

Due Process

The Fourteenth Amendment to the United States Constitution provides that no person shall be deprived of their liberty without due process of law. Article II, § 8 of the Arkansas Constitution similarly provides that no person shall "be deprived of life, liberty or property, without due process of law [.]" The Arkansas Supreme Court interprets Art. II, § 8 consistently with the United States Supreme Court's Fourteenth Amendment jurisprudence. *See Long v. State*, 680 S.W.2d 686, 687 (Ark. 1984).

In *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), the Supreme Court held that where a person's good name or reputation is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. The Supreme Court subsequently interpreted *Constantineau* in *Paul v. Davis*, 424 U.S. 693 (1976), holding that mere injury to reputation does not constitute the deprivation of a liberty interest and "some more tangible interest such as employment" was necessary to trigger the requirement of due process. *See Bohn v. County of Dakota*, 772 F.2d 1433 (8th Cir. 1985) (reputations of parents identified as child abusers plus the privacy and autonomy of familial relationships were

protectible interests under the Fourteenth Amendment due process clause).

Plaintiffs recognize that in *Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 1 (2003), the Supreme Court held that a notification system that simply makes sex offender convictions available to the public is constitutional. They argue, however, that the Registration Act goes beyond mere community notification and subjects them to a process by which each is adjudicated to be at a risk level designed to represent his dangerousness to the community. They state the notification efforts are monumental and far exceed the statutory systems in states where active notification has been held to require due process; that raw police reports are included in the assessment; that the assessment system charges the offender with far greater opprobrium than the initial conviction; and that an assessment may result in residency restrictions. These added factors, plaintiffs argue, require that due process be provided to them prior to the risk assessment determination. Defendants assert that even assuming plaintiffs are deprived of a liberty interest as a result of the assessment, the Registration Act provides them with notice before the assessment and constitutionally sufficient procedural protections during and after it.

Plaintiffs do not appear to contend that the Registration Act does not provide sex offenders with sufficient notice. Their core argument seems to be that sex offenders are denied any meaningful opportunity to be heard regarding their initial risk assessment as well as any subsequent appeals. Plaintiffs point out that because they had an established risk level subsequent to August 1, 1997 and prior to June 3, 2004, they have no opportunity for an administrative review of their assessed risk level as Act 21 did not provide for reassessment of sex offenders prior to its going into effect. Additionally,

they say they have no administrative remedies available to them because they are beyond the deadlines for requesting an administrative and judicial review. Plaintiffs assert, however, that even if the amended statute applied retroactively, the statute deprives sex offenders like themselves the opportunity to confront testimonial evidence used by defendants in establishing their levels of risk, the right to an attorney, and other due process guarantees. They complain they have no right to the assistance of counsel at the interview with the SOSRA examiner and cannot confront the person or persons responsible for a whole range of documentary evidence being considered by the examiner. Plaintiffs complain that an administrative review is nothing more than a review of a defective procedure.

The concept of "'due process is flexible and calls for such procedural protections as the particular situation demands.'" *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471 (1972)). "Due process requires adequate notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Marler v. Missouri State Bd. of Optometry*, 102 F.3d 1453, 1456 (8th Cir. 1996) (internal quotation marks omitted)." The Supreme Court set forth a three-part balancing test for determining "when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." *Matthews*, 424 U.S. at 348. The Court must consider (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

Defendants argue the private interests of the sex offenders in not having information about themselves disseminated in their communities is slight. The information consists of the offender's name, aliases, date of birth, sex offense convictions, street name and block number of his or her residence, race and gender, date of his or her last address verification, photograph, and parole or probation office. Ark. Code Ann. § 12-12-913(j)(1)(A). They claim this information would be in the public realm even without community notification. Defendants assert the interests of level 3 and 4 sex offenders living near schools and daycare facilities is balanced against the public interest in protecting children. In the case of level 3 offenders, only level 2 community notification is made during the administrative appeal or appeal to the circuit court. Thus, there is nothing to prevent a person appealing from a level 3 assessment from residing near a school or daycare center while the appeal is pending.

Defendants assert there is no much risk of an erroneous deprivation of these interests through the procedures in place. They argue there are ample pre-community notification procedural protections in place to prevent offenders from being given an incorrect assessment level. In addition to the opportunity for a face-to-face interview with an SOSRA employee, the assessment process includes a review of the official records pertaining to the sex offenses and other criminal history, from police reports to psychiatric reports. Further, the assessment process includes any psychological tests or other methods that the assessment team deems necessary to accurately assess the offender's risk of re-offending. Defendants argue the probable value of additional pre-community notification procedures would be negligible.

Defendants assert the State's interest in notifying the community after assessment but before any administrative or

judicial appeal is compelling. They cite *Connecticut Dep't of Public Safety, supra,* 538 U.S. at 4, where the Supreme Court states: "'Sex offenders are a serious threat in this Nation.' "'[T]he victims of sex assault are most often juveniles,' and '[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sex assault.'" Considering this risk, defendants argue the State should not be forced to wait until offenders have exhausted their administrative appeal to SOAC and a subsequent judicial appeal before notifying the community.

Considering the Registration Act in light of the balancing test set forth in *Matthews v. Eldridge,* the Court finds that plaintiffs' private interests are substantial. Community notification under the Act likely will affect their interests in reputation and privacy as well as their place of residence. The Court finds that the risk of an erroneous deprivation is slight. The assessment process and procedures in place give the offender the opportunity to review the information being used to establish his risk level and to seek administrative and judicial review. Plaintiffs argue they have no opportunity to confront testimonial evidence used by the State and should have the right to an attorney. In light of the Court's finding *infra* that the assessment process is a civil proceeding, and the State's compelling interest in notifying the community and protecting children, the Court finds that affording the right to counsel and to confront witnesses concerning evidence would be unduly burdensome.

Plaintiffs also allege that the Registration Act and the procedural guidelines are void for vagueness.

> A vague regulation violates the Constitution in two significant respects. Such a regulation or enactment

> fails, (1) to define the offense with sufficient definiteness that ordinary people can understand prohibited conduct; and (2) to establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner. In a facial vagueness challenge, an enactment reaching a substantial amount of constitutionally protected conduct may withstand constitutional scrutiny only if it incorporates a high level of definiteness. an enactment imposing criminal sanctions or implicating constitutionally protected rights demands more definiteness than one which regulates the economic behavior of businesses or the conduct of students in the school setting.

Woodis v. Westark Comty. College, 160 F.3d 435, 438 (8th Cir. 1998). Specifically, plaintiffs assert the Guidelines are void for vagueness because of certain language under the "Overrides and Departures" section.

The introductory paragraph contains the following statement: "The following overrides and departures represent the primary (but not exclusive) causes to modify the actuarial risk assessment." *Guidelines* at 18. The second paragraph dealing with "Overrides" states:

> If statements made by the offender during the interview, or *certain features of the psychological assessment,* or the *judgment of clinical staff,* or *relevant historical data* suggest higher risk than the actuarial model predicts, the offender may be assigned to a higher risk level.

Paragraph three states: "If the offense involved extreme physical injury, death, or *other heinous actions,* the offender should be assigned to the highest level of risk." *Guidelines*

at 19 (italics added). Plaintiffs argue there are no definitions and no "real" guidelines but merely a description of the assessment process and then "Overrides and Departures." Plaintiffs further point to the final page of the Guidelines which contains a Disclaimer stated in bold letters: **"There is no foolproof method of predicting human behavior."** *Guidelines* at 33.

Plaintiffs argue that the phrases noted above are just as vague or more so than the phrase "gang related activities" contained in a school regulation found void for vagueness in *Stephenson v. Davenport Comty. Sch. Dist.*, 110 F.3d 1303 (8th Cir. 1997). The school district's disciplinary regulations forbid gang related activities "such as display of 'colors,' symbols, signals, signs, etc. ..." The plaintiff was suspended and forced to remove a tattoo of a small cross. The court noted that rules made fo a school setting need not be as detailed as a criminal code which imposes criminal sanctions. On the other hand, the court said that because "the literal scope of the District regulation 'is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Id.* at 1308-09. In finding the regulation void for vagueness, the court held that a person of common intelligence would have to guess at the meaning of "gang related activities."

A state statute is presumed constitutional. Consequently, a party challenging the constitutionality of a state statute bears a heavy burden. *Estate of Branson v. O. F. Mossberg & Sons, Inc.*, 221 F.3d 1064, 1065 n. 4 (8th Cir. 2000). An agency's interpretation of a statute that it is charged with administering is entitled to considerable deference. *Groseclose v. Brown*, 809 F.2d 502, 505 (8th Cir. 1987)

(citing *Young v. Comty. Nutrition Inst.*, 476 U.S. 974 (1986)). In *Young*, the Supreme Court stated:

> '[I]f a statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

476 U.S. at 980.

Plaintiffs cannot establish that the state defendants' interpretation of the statute is clearly wrong. The language plaintiffs target in the Guidelines informs the offender that the process of predicting behavior is not simple, and that the assessment team has flexibility to include additional factors affecting the final determination of risk. This flexibility permits SOSRA to reach the most accurate prediction of future behavior for each offender, but, as the disclaimer states, it is not a foolproof process.

The Guidelines provide that the assessment of an adult offender's risk level will be based on actuarial analysis, information obtained from interviews, psychological testing and evaluation, review of relevant records and historical data, and polygraph or penile plethysmograph, if deemed necessary by the team conducting the evaluation. *Guidelines*, at 10. The flexibility provided in the risk assessment procedure by the Overrides and Departures takes into account special circumstances of a particular case.

The Registration Act grants SOSRA the authority to review documents from various public agencies which include but are not limited to: police reports; statements of probable

cause; presentence investigations and reports; complete judgments and sentences; current classification referrals; criminal history summaries; violation and disciplinary reports; all psychological evaluations and psychiatric hospital reports; sex offender or sexually violent predator treatment program reports; juvenile court records; victim impact statements; investigation reports to the state's child abuse hotline; and statements of medical providers treating victims of sex offense indicating the extent of injury to the victim. Ark. Code Ann. § 12-12-917(c)(2) (as amended by 2003 Ark. Act 21 (2nd Ex. Sess.)). The availability of overrides and departures does not make the Act or the Guidelines unconstitutional.

Sixth Amendment

Plaintiffs claim the Registration Act is unconstitutional because it deprives them of their rights under the Sixth Amendment to confront the witnesses against them and to a trial by jury. The Sixth Amendment provides that defendants in criminal prosecutions "shall enjoy the right to a speedy and public trial . . . to be confronted by witnesses against him . . . and to have the Assistance of Counsel for his defence." The Fourteenth Amendment guarantees that these rights also apply to actions by state governments.

The provisions of the Registration Act are civil statutes, intended as a mechanism for law enforcement to use to protect the public from potentially dangerous people, specifically those individuals who have been convicted of certain sex crimes. Ark. Code Ann. § 12-12-902 (Repl. 2003). The General Assembly specifically noted that such public protection was "a primary governmental interest." *Id.*

The Registration Act requires that sex offenders be assessed to determine their likelihood of re-offending, or the

level of risk they pose to the public when released from custody. Ark. Code Ann. § 12-12-917(b)(1) (as amended by 2003 Ark. Act 21 92nd Ex. Sess.)). The assessment of sex offenders in Arkansas is an administrative process, not a criminal prosecution, and is part of a regulatory scheme to monitor convicted sex offenders. "[T]he applicability of Sixth Amendment protections to civil statutory proceedings . . . [is] determined not with reference to the particular sanction ultimately imposed, but rather by considering the proceeding's inherent nature, identified through recourse to 'statutory language, structure, and intent.'" *U.S. v. Certain Real Property and Premises*, 945 F.2d 29, 35 (2nd Cir. 1992) (citations omitted). In holding the Registration Act is not an *ex post facto* law, the Arkansas Supreme Court found the inherent nature of the assessment, registration, and notification procedures is civil and regulatory. *Keller v. Fayetteville Police Dep't*, 5 S.W.3d 402 (Ark. 1999). Because the Registration Act is a civil statutory scheme, the provisions of the Sixth Amendment do not apply.

Even if the provisions of assessment, registration, and notification constituted additional punishment for convictions for sex crimes, such classification would not trigger Sixth Amendment protections. Classification of civil proceedings as punitive subsequent to a conviction does not automatically transform those proceedings into criminal prosecutions with all the procedural safeguards required by the Constitution. *Certain Real Property*, 954 F.2d at 35. The provisions in the regulatory registration, assessment, and notification scheme impose no specific affirmative disability or restraint on convicted sex offenders in Arkansas. *Kellar*, 5 S.W.3d at 407. Because the statutes are regulatory, they iimpose no additional punishment on plaintiffs and cannot be considered punitive. As the registration statutes are not punitive, and

therefore the assessment process is not a criminal prosecution, the provisions of the Sixth Amendment are not applicable.

b. Constitutionality of Ark. Code Ann. § 5-14-128

Arkansas Code Annotated § 5-14-128(a) provides:

> It shall be unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Lever 4 offender to reside within two thousand feet (2000') of the property on which any public or private elementary or secondary school or daycare facility is located.

Subsections (b) and (c) provide defenses to a charge of violating this statute. Subsection (b) provides:

> (b)(1) It shall not be a violation of this section if the property on which the sex offender resides is owned and occupied by the offender and was purchased prior to the date on which the school or daycare center was established.
>
> (2) The exclusion in subsection (b)(1) of this section shall not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense after the school or daycare center is established.

Ark. Code Ann. § 5-14-128 (b). The second defense states:

> (c)(1) It shall not be a violation of this section if the sex offender resides on the property he or she owns prior to July 16, 2003.

> (2) The exclusion in subsection (c)(1) of this section shall not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense after July 16, 2003.

Ark. Code Ann. § 5-14-128(c).

In Counts III-VI of their amended complaint, plaintiffs complain the Residency Restriction is unconstitutional because it: (1) deprives sex offenders assigned a risk assessment at level 3 or level 4 of equal protection by imposing restrictions on their fundamental rights, which restrictions are not imposed on exempt property-owning sex offenders or on sex offenders assigned a risk assessment at level 1 or level 2; (2) restricts their fundamental liberty interests; (3) deprives them of fundamental liberty interests without sufficient notice and without any meaningful opportunity to be heard; and (4) is an ex post facto law. Am. Compl., ¶¶23-29.

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. It directs that all similarly situated persons shall be treated alike but does not require things that are different to be treated the same. *Plyler v. Doe,* 457 U.S. 202, 216 (1982). When a classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class, equal protection analysis requires strict scrutiny of a legislative classification. *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 312-13 (1976). If a classification does not burden a fundamental right or target a suspect class, it will be upheld if it bears a rational relationship to a legitimate end.

Weiler v. Purkett, 137 F.3d 1047, 1051 (8th Cir. 1998) (en banc).

Pursuant to the Residency Restriction, property-owning level 3 and level 4 sex offenders are allowed to reside on their property if they occupied the property and had purchased it prior to the date on which the school or daycare facility was established, or if they resided on the property prior to July 16, 2003. Plaintiffs, non-property-owning level 3 and level 4 sex offenders, claim that the statute, which distinguishes between property-owning and non-property owning level 3 and level 4 sex offenders, implicates their fundamental personal right to acquire, enjoy, own, and dispose of property, thus triggering the strict scrutiny analysis. State defendants assert the rational-basis test applied when determining the constitutionality of a statutory classification based on property ownership. Relying on *Nordlinger v. Hahn,* 505 U.S. 1 (1992), state defendants argue that protecting property owners' reliance interest is a legitimate government purpose for a classification system based on property ownership.

The Court finds that the rational-basis review is appropriate here as the classification neither impermissibly interferes with the exercise of a fundamental right nor is drawn upon inherently suspect distinctions. "Under rational basis review, challenged statutory classifications are accorded a strong presumption of validity, which is overcome only if the party challenging them negates 'every conceivable basis which might support it.'" *Independent Charities of America v. State of Minnesota,* 82 F.3d 791, 797 (8th Cir. 1996)(citation omitted). "Legislative bodies are given broad latitude in their legislative determinations, 'and it is not the province of the courts to monitor the imputs into each legislative decision.' Similarly, 'the 'true' purpose of the ordinance, (i.e., the actual purpose that may have motivated

its proponents, assuming this can be known), is irrelevant for rational-basis analysis.'" *WMX Techs., Inc. v. Gasconade County, Mo.*, 105 F.3d 1195, 1201 (8th Cir. 1997)(citation omitted).

The Court acknowledges that no legitimate argument can be made that non-property-owning sex offenders pose a greater threat to children than property-owning sex offenders. The Court finds, however, that the Residency Restriction, when analyzed in the context of a land-use restriction, has a rational basis and can withstand plaintiffs' equal protection claim.

In an effort to create a safe environment for children, the State has determined that certain sex offenders will not be allowed to reside within 2000' feet of a school or daycare facility. The Residency Restriction recognizes, however, that some level 3 and level 4 sex offenders occupied property and had purchased it prior to the date on which the school or daycare facility was established, or resided on the property prior to July 16, 2003. Thus, the Residency Restriction defenses allow those offenders to remain in their residences. Although defendants do not make this analogy, the defenses set forth in the statute are similar to the accommodation made for non-conforming uses in the wake of zoning restrictions.

A non-conforming use is a use which, although it does not conform with existing zoning laws, existed lawfully prior to the enactment of the zoning laws. These uses are permitted to continue even though they are technically in violation of the current zoning law. Just as zoning laws grandfather many pre-existing undesirable uses, the defenses set forth in the Residency Restriction allow property-owning level 3 and level 4 sex offenders to continue to reside in their homes.

Courts generally presume legislation to be valid and will uphold it against an equal protection challenge of its classifications are rationally related to a legitimate governmental interest. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). The Residency Restriction is rationally related to the State's interest in providing a safe environment for children. While the statute does not prohibit all level 3 and level 4 sex offenders from residing in the areas sought to be protected, it does prohibit any more of those offenders from moving into the area, thus reducing the overall number and making the area safer.

State defendants assert that were the Court to find that the property-ownership defenses violate equal protection, those provisions are severable and the appropriate remedy would be to enjoin only the defenses, leaving the remainder of the statute intact. Under the Court's land-use analysis, if that were done and property-owning level 3 and level 4 sex offenders were not allowed to reside in their own homes, the State would be put in the position of having to pay those offenders compensation for the loss of use of their homes. A zoning ordinance cannot operate to divest a property owner of the right to use the property in the manner it was used before the zoning restriction was adopted. It is unreasonable to anticipate that the State could afford to buy out all level 3 and level 4 property-owning sex offenders residing in the restricted areas. On the other hand, a determination that the statute in its entirety is unconstitutional would result in no restriction on where level 3 and level 4 sex offenders may reside.

A legislature may legislate in small increments, taking "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 489

(1955). While recognizing that the defenses in § 5-14-128 hamper the State's effort to create a safe environment for children, the statute is a step toward that goal. In time, those property-owning sex offenders will die or sell their property, resulting in fewer residing in the areas to be protected. Also, the goal of the legislation is furthered by the fact that schools and daycare facilities will be able to determine where and how many level 3 and level 4 sex offenders reside in the area and know that no more of those offenders will be moving into the area.

In light of the above and in the context of an equal-protection claim arising from a land-use decision, the Court finds the Residency Restriction does not violate the Equal Protection Clause. *See Door Store, Inc. v. City of Tacoma,* No. 90-35213,1991 WL 181718, at *1 (9th Cir. Sept. 17, 1991) (allowing certain preexisting nonconforming uses to continue pursuant to a zoning scheme does not violate equal protection); *Merry Charters, LLC v. Town of Stonington,* ___ F. Supp. 2d ___, 2004 WL 2471524 (D.Conn. Oct. 27, 2004) (plaintiff not similarly situated to commercial tour boat company whose dock was a pre-existing nonconforming use that did not require special permit in order to operate).

Plaintiffs also claim the Residency Restriction denies level 3 and level 4 sex offenders equal protection by impermissibly impinging on their fundamental right to reside in the place of their choice. They assert that even under a rational relationship test, there is no rational basis for distinguishing between levels of sex offenders regarding residency restrictions if sex offenders pose any threat at all to pre-school or school-age children. State defendants argue plaintiffs do not have a fundamental right to reside in a certain place or to travel locally unimpeded by their previous crimes. Using the rational basis test, state defendants argue it is rational for the

Residency Restriction to apply to those sex offenders who are prone to have uncontrollable impulses.

"Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam). Plaintiffs assert the Residency Restriction violates their fundamental rights concerning familial associations.

A statutory classification that does not directly and substantially interfere with family living arrangements does not burden a fundamental right. *Lyng v. Castillo,* 477 U.S. 635, 638 (1986). In *Lyng,* the Supreme Court applied the rational-basis test when reviewing a federal statute that provided food stamps to households rather than individuals. The statute treated unrelated persons who lived together as a single household only if they customarily purchased food and prepared meals together. In contrast, it treated parents, children, and siblings who lived together as a single household, even if they did not purchase food and prepare meals together. As a result, families were treated worse than unrelated persons. In upholding the statute, the Supreme Court applied the rational basis test because the statute did not "directly and substantially" interfere with family living arrangements, even though some family members could conceivably choose to move in order to receive benefits as individuals. *Id.* at 638. In *Bowen v. Gilliard,* 483 U.S. 587, 598-603 (1987), the Supreme Court applied the rational-basis test when upholding a federal statute that used the income of all parents and siblings living in the home when determining eligibility for welfare benefits. The Court refused to apply

any form of heightened scrutiny, stating: "That some families may decide to modify their living arrangements in order to avoid the effect of the amendment, does not transform the amendment into an act whose design and direct effect are to 'intrud[e] on choices concerning family living arrangements.'" *Id.* at 601-02 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977)).

Section 5-14-128 does not purport to prohibit certain relatives from living together as a family. It does not prohibit plaintiffs from residing with whomever they wish. It merely prohibits them from living within 2000 feet of a school or daycare facility. Ark. Code Ann. § 5-14-128(a). In other words, the statute speaks in terms of geography, not familial relationships. It does not directly and substantially interfere with level 3 and level 4 sex offenders' ability to live with their families. Thus, the Court finds the rational-basis test is applicable when determining whether the statute violates plaintiffs' rights.

The General Assembly determined not to place all sex offenders into one category but instead to assign them to one of four groups or levels. The existence of sexual compulsions and an inability or difficulty controlling them are among the factors that distinguish level 3 and level 4 sex offenders from level 1 and level 2 offenders. Level 4 offenders, the most dangerous, are classified as "sexually violent predators." They "are individuals . . . who have sexual or violent compulsions that they lack the ability to control." *Guidelines* at 18. Level 3 offenders are likely to have sexual compulsions that "may be kept under control when relapse prevention plans are followed and treatment is continued." *Id.* "The offense patterns of these individuals reflect a relatively high probability of re-offense and/or a risk of substantial injury to victims should re-offense occur." *Id.* On

the other hand, by definition, there is no indication that level 1 and 2 offenders have uncontrollable sexual compulsions. *Id.*

It is the absence of uncontrollable sexual compulsions that makes level 1 and 2 offenders less dangerous to children. Thus, allowing level 1 and 2 sex offenders to reside within 2000 feet of schools and daycare facilities, while prohibiting level 3 and 4 offenders from doing the same, is rationally related to the legitimate government purpose of protecting children from the most dangerous sex offenders. Thus, the Court finds the Residency Restriction does not violate the equal protection rights of level 3 and level 4 sex offenders.

Substantive Due Process

In Count IV of their complaint, plaintiffs claim the Residency Restriction impermissibly restricts their fundamental liberty interests. In particular, plaintiffs assert the statute interferes with their right to live with family members and their right to travel locally through public spaces and roadways.

> Substantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty. There are two different ways of stating a substantive due process claim. First, the state violates substantive due process when it infringes "fundamental" liberty interests, without narrowly tailoring that interference to serve a compelling state interest. Second, the state violates substantive due process when it engages in conduct that is so outrageous that it shocks the conscience or otherwise

> offends 'judicial notions of fairness, [or is] offensive to human dignity.'

Weiler v. Purkett, 137 F.3d 1047, 1051 (8th Cir. 1998) (citations omitted). The first step in analyzing a substantive due process claim is to determine whether the strict-scrutiny test, the rational-basis test, or a test that lies somewhere in between is the appropriate standard of review. *See Washington v. Glucksberg*, 521 U.S. 702 (1997). Statutes are not reviewed under the strict-scrutiny test unless they disadvantage an inherently suspect class or impinge a fundamental right. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Sex offenders are not a suspect class. *See Wirsching v. Colorado*, 360 F.3d 1191 (10th Cir. 2004); *United States v. LeMay*, 260 F.3d 1018, 1030 (9th Cir. 2001); *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999); *Artway v. Attorney General*, 81 F.3d 1235 (3rd Cir. 1966).

As discussed above, plaintiffs do not have a fundamental right to reside in a certain place. The Court further finds that plaintiffs do not have a fundamental right to travel locally unimpeded by their previous crimes.

> The very word 'travel' is not found in the Constitution, but the 'right to travel' as a fundamental right is firmly entrenched. The right is so important that it 'is assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.' The 'right' as discussed by the U.S. Supreme Court involves three different components: the right to travel from one state to another, the right to be treated as a welcome visitor and if residence changes, the right to be treated equally with citizens of the new home state.

Saenz v. Roe, 526 U.S. 489, 500 (1999). Plaintiffs do not assert that the statute impinges on the right to interstate travel. Rather, they contend the Constitution protects intrastate travel as a fundamental right.

In *Johnson v. Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002), the court considered the constitutionality of a city ordinance that banned persons convicted of drug crimes from entering 'drug exclusion zones." The court held that the Constitution "protects a right to travel locally through public spaces and roadways." Relying on this decision, the court in *Doe v. Miller,* 298 F. Supp. 844 (S.D. Iowa 2004), found that a state statute prohibiting sex offenders from residing within 2000 feet of a school or child care facility infringed on the plaintiffs' fundamental right to interstate and intrastate travel. Plaintiffs here assert the Residency Restriction limits their ability to move freely through the public spaces and roadways of Arkansas, including their right to remain in the public place of their choice. They also claim it limits their choices of employment, training and/or education.

The Residency Restriction restricts only where a sex offender can live, not where he can work or travel. It does not impact on a sex offender's right to intrastate travel. The Iowa statute at issue in *Doe* prohibited sex offenders from residing within 2000 feet of schools and day care facilities. It defines "residence" as "the place where a person sleeps, which may be more than one location, and may be mobile or transitory." *Doe*, 298 F. Supp. at 875. Thus, the court in *Doe* held that the Iowa statute impacted the right to intrastate travel because it effectively prohibited a sex offender who was passing through from stopping for the night at a hotel within 2000 feet of a school. *Id.* Unlike the Iowa statute, § 5-14-128 does not define "residence" as anyplace where a sex offender happens to spend the night. The Court is unaware of

any Supreme Court or Eighth Circuit Court of Appeals case holding there is a fundamental right to intrastate travel. In addition, the Court finds the Residency Restriction does not restrict plaintiffs' right to intrastate travel.

Procedural Due Process

In Count V of their amended complaint, plaintiffs claim the Residency Restriction impermissibly deprives them of fundamental liberty interests without sufficient notice and without any meaningful opportunity to be heard.

There is no dispute that Ark. Code Ann. § 5-14-128 is a criminal statute. As such, if plaintiffs are ever charged with violating it, they would have the right to all the protections associated with a criminal jury trial. Plaintiffs repeat their contention that the Act does not provide any procedure for an individual risk assessment of an offender who was released prior to the Act's effective date. In other words, the restrictions apply to all level 3 and level 4 offenders regardless of whether their pre-release assessment occurred five years or one day before the effective date of the Act. They further complaint that the restrictions are placed on plaintiffs without any showing that they pose a risk to pre-school or school age children.

The Court previously discussed the procedural protections contained in the Registration Act, and found those protections satisfy the procedural due process requirements of the federal and state constitutions.

Ex Post Facto

Lastly, plaintiffs complain that the enactment, implementation, and application of the Residency Restriction

violates the *Ex Post Facto* clauses of the United States and Arkansas constitutions.

The United States Constitution prohibits states from enacting laws with certain retroactive effects. U.S. Const. art. I, § 10, cl. 1. *Strogner v. California,* ___ U.S. ___, 123 S.Ct. 2446 (2003). In *Calder v. Bull,* 3 Dall. 387 (1798), Justice Chase divided *ex post facto* laws into categories that he described in two alternative ways. He wrote:

> 'I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd *Every law that aggravates a crime, or makes it greater than it was, when committed.* 3rd Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th *Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.* All these, and similar laws, are manifestly unjust and oppressive.'

Strogner, supra, 123 S.Ct. at 2450 (quoting *Calder v. Bull*). Plaintiffs contend that the Residency Restriction is the third type of *ex post facto* law in that it increases the punishment for their previous sex offenses. Thus, the issue is whether the statute punishes plaintiffs for sex offenses committed before the statute went into effect on July 16, 2003.

Section 5-14-128 makes it a criminal offense for a level 3 or level 4 sex offender to reside within 2000 feet of a school or day care facility. It does not punish an offender for

previous sex offenses; it merely prohibits an offender from residing within the protected zone after the effective date. *In United States v. Pfeifer*, 371 F.3d 430, 436 (8th Cir. 2004), the court considered whether the felon-in-possession statute violated the *ex post facto* clause because it effectively increased the punishment for a crime committed 17 years earlier. The court found "the critical factor . . . is that the prohibited conduct - possession of a firearm - occurred after enactment of the statute." *See also United States v. Farmer*, 73 F.3d 836, 841 (8th Cir. 1996) (rejecting argument that three-strikes statute increased punishment for crimes committed before its enactment).

The conduct to which the criminal penalty attaches is not the conviction which occurred prior to the enactment but the act of establishing an illegal residence subsequent to the effective date of the statute. The Court thus finds the Residency Restriction is not an *ex post facto* law.

Conclusion

IT IS THEREFORE ORDERED that defendants' motions to dismiss[5] are granted. Plaintiffs' claims are dismissed.[6] IT IS FURTHER ORDERED that the restrictions set forth in the Agreed Order of May 28, 2004, will remain in effect pending resolution of this case on appeal or until the time for filing an appeal has expired.

---

[5] Docket entries 19, 26, 28, 44, 54, 56, and 57.

[6] Plaintiffs' motion to class action certification [docket entry 4] and second motion to amend complaint [docket entry 63] are denied.

DATED this 30th day of November, 2004.

/s/ Susan Webber Wright
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

Amendment Fourteen to the United States Constitution

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARK. CODE ANN. § 12-12-902 - Legislative findings

The General Assembly finds that sex offenders pose a high risk of reoffending after release from custody, that protecting the public from sex offenders is a primary governmental interest, that the private interest of persons adjudicated guilty of sex offenses is less important than the government's interest in public safety, and that the release of certain information about sex offenders to criminal justice agencies and the general public will assist in protecting the public safety

ARK. CODE ANN. § 12-12-913. Disclosure

(a)(1) Registration records maintained pursuant to this subchapter shall be open to any criminal justice agency in this state, the United States, or any other state.

(2) Registration records may also be open to government agencies authorized by law to conduct confidential background checks.

(b) In accordance with guidelines promulgated by the Sex Offenders Assessment Committee, local law enforcement agencies having jurisdiction shall disclose relevant and necessary information regarding sex offenders to the public when the disclosure of such information is necessary for public protection.

(c)(1)(A) The Sex Offenders Assessment Committee shall promulgate guidelines and procedures for the disclosure of relevant and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection.

(B) In developing the guidelines and procedures, the Sex Offenders Assessment Committee shall consult with persons who, by experience or training, have a personal interest or professional expertise in law enforcement, crime prevention, victim advocacy, criminology, psychology, parole, public education, and community relations.

(2)(A) The guidelines and procedures shall identify factors relevant to a sex offender's future dangerousness and likelihood of reoffense or threat to the community.

(B) The guidelines and procedures shall also address the extent of the information to be disclosed and the scope of the community to whom disclosure shall be made as these factors relate to the:

(i) Level of the sex offender's dangerousness;

(ii) Sex offender's pattern of offending behavior; and

(iii) Need of community members for information to enhance their individual and collective safety.

(3) The Sex Offenders Assessment Committee shall submit the proposed guidelines and procedures to the House Committee on Public Health, Welfare, and Labor and the Senate Committee on Public Health, Welfare, and Labor for their review and shall report to the House Committee on Public Health, Welfare, and Labor and the Senate Committee on Public Health, Welfare, and Labor every six (6) months on the implementation of this section.

(d)(1) A local law enforcement agency having jurisdiction that decides to disclose information pursuant to this section shall make a good faith effort to notify the public and residents at least fourteen (14) days before a sex offender is released or placed into the community.

(2) If a change occurs in a sex offender's release plan, this notification provision shall not require an extension of the release date.

(3) In conjunction with the notice provided under § 12-12-914, the Department of Correction and the Departmentof Health and Human Services shall make available to a local law enforcement agency having jurisdiction all information

that the Department of Correction and the Department of Health and Human Services have concerning the sex offender, including information on risk factors in the sex offender's history.

(e)(1) A local law enforcement agency having jurisdiction that decides to disclose information under this section shall make a good faith effort to conceal the identity of the victim or victims of the sex offender's offense.

(2) Except as provided in subsection (j) of this section, information under this section is not subject to disclosure under the Freedom of Information Act of 1967, § 25-19-101 et seq.

(f) A local enforcement agency having jurisdiction may continue to disclose information on a sex offender under this section for as long as the sex offender is required to be registered under this subchapter.

(g)(1) The State Board of Education, the Arkansas Higher Education Coordinating Board of the Department of Higher Education, and the State Board of Workforce Education and Career Opportunities shall promulgate guidelines for the disclosure to students and parents of information regarding a sex offender when such information is released to a local school district or institution of higher education or vocational training by a local law enforcement agency having jurisdiction.

(2) In accordance with guidelines promulgated by the State Board of Education, the board of directors of a local school district or institution of higher education or vocational training shall adopt a written policy regarding the distribution to students and parents of information regarding a sex offender.

(h) Nothing in this section shall prevent a law enforcement officer from notifying members of the public about a person who may pose a danger to the public for a reason that is not enumerated in this subchapter.

(i) The medical records or treatment evaluations of a sex offender or sexually violent predator are not subject to disclosure under the Freedom of Information Act of 1967, § 25-19-101 et seq.

(j)(1)(A) The following information concerning a registered sex offender who is classified as a level 3 or level 4 offender by the Sex Offender Screening and Risk Assessment shall be made public:

(i) The sex offender's complete name, as well as any aliases;

(ii) The sex offender's date of birth;

(iii) The sexual offense or offenses to which the sex offender has pleaded guilty or nolo contendere or of which the sex offender has been found guilty by a court of competent jurisdiction;

(iv) The street name and block number, county, city, and zip code where the sex offender resides;

(v) The sex offender's race and gender;

(vi) The date of the last address verification of the sex offender provided to the center;

(vii) The most recent photograph of the sex offender that has been submitted to the center; and

(viii) The sex offender's parole or probation office.

(B) The center shall prepare and place the information in subdivision (j)(1)(A) of this section on the Internet home page of the State of Arkansas.

(2) The center may promulgate any rules necessary to implement and administer this subsection.

(k) Nothing in this subchapter shall be interpreted to prohibit the posting on the Internet or by other appropriate means of offender fact sheets for those sex offenders who are determined to be:

(1) High-risk or sexually violent predators, risk level 3 and level 4; or

(2) In noncompliance with the requirements of registration under rules and regulations promulgated by the Sex Offender Assessment Committee.

Acts of 1997, Act 989, § 13; Acts of 1999, Act 1353, § 8, eff. Sept. 1, 1999; Acts of 2001, Act 1743, § 10, eff. Aug. 13, 2001; Acts of 2003, Act 330, §§ 1, 2, eff. July 16, 2003; Acts of 2003 (2nd Ex. Sess.), Act 21, § 6, eff. June 3, 2004; Acts of 2005, Act 1962, § 35, eff. Aug. 12, 2005.

ARK. CODE ANN. § 12-12-917. Evaluation protocol--examiners

(a)(1) The Sex Offender Assessment Committee shall develop an evaluation protocol for preparing reports to assist courts in making determinations whether or not a person adjudicated guilty of a sex offense should be considered a sexually violent predator for purposes of this subchapter.

(2) The committee shall also establish qualifications for examiners and qualify examiners to prepare reports in accordance with the evaluation protocol.

(b)(1) The committee shall cause an assessment to be conducted on a case-by-case basis of the public risk posed by a sex offender or sexually violent predator:

(A) Who is required to register under § 12-12-905 after August 1, 1997; and

(B) For whom the Arkansas Crime Information Center has no record of an assessment's being done and a risk level established subsequent to August 1, 1997.

(2)(A)(i) An adult offender convicted of an offense described in 42 U.S.C. § 14071 et seq., as it existed on March 1, 2003, or § 12-12-903(12) shall be assessed.

(ii)(a) Subject to subdivision (c)(1) of this section, the prosecuting attorney and any law enforcement agency shall furnish the file relating to the offender to Sex Offender Screening and Risk Assessment at the Department of Correction within thirty (30) days of an offender's adjudication of guilt.

(b)(1) The prosecuting attorney shall make a copy of any relevant records concerning the offender and shall forward the copied relevant records to Sex Offender Screening and Risk Assessment within thirty (30) days of the adjudication.

(2) The relevant records include, but are not limited to:

(A) Arrest reports;

(B) Incident reports;

(C) Offender statements;

(D) Judgment and disposition forms;

(E) Medical records;

(F) Witness statements; and

(G) Any record considered relevant by the prosecuting attorney.

(B) A sex offender sentenced to life, life without parole, or death shall be assessed only if the sex offender is being considered for release through clemency.

(3) A sex offender currently in the state who has not been assessed and classified shall be identified by the center.

(4)(A) If a sex offender fails to appear for assessment, is aggressive, threatening, or disruptive to the point that Sex Offender Screening and Risk Assessment staff cannot proceed with the assessment process, or voluntarily terminates the assessment process after having been advised of the potential consequences:

(i) The sex offender shall be classified in risk level 3 or referred to the Sex Offender Assessment Committee as a risk level 4; and

(ii) The parole or probation officer, if applicable, shall be notified.

(B) A sex offender has immunity for a statement made by him or her in the course of assessment with respect to prior conduct under the immunity provisions of § 16-43-601 et seq.

(C) Assessment personnel shall report ongoing child maltreatment as required under the Arkansas Child Maltreatment Act, § 12-12-501 et seq.

c)(1) To the extent permissible and under the procedures established by state and federal regulations, public agencies shall provide the committee access to all relevant records and information in the possession of public agencies or any private entity contracting with a public agency relating to the sex offender or sexually violent predator under review.

(2) The records and information include, but are not limited to:

(A) Police reports;

(B) Statements of probable cause;

(C) Presentence investigations and reports;

(D) Complete judgments and sentences;

(E) Current classification referrals;

(F) Criminal history summaries;

(G) Violation and disciplinary reports;

(H) All psychological evaluations and psychiatric hospital reports;

(I) Sex offender or sexually violent predator treatment program reports;

(J) Juvenile court records;

(K) Victim impact statements;

(L) Investigation reports to the child abuse hotline, the Division of Children and Family Services of the Department of Health and Human Services, and any entity contracting with the Department of Health and Human Services for investigation or treatment of sexual or physical abuse or domestic violence; and

(M) Statements of medical providers treating victims of sex offenses indicating the extent of injury to the victim.

(d)(1)(A) Records and information obtained under this section shall not be subject to the Freedom of Information Act of 1967, § 25-19-101 et seq., unless otherwise authorized by law.

(2)(A)(i) The sex offender or sexually violent predator shall have access to records and information generated and maintained by the committee.

(ii) These records shall include any reports of the assessment and the tape of the interview but do not include restricted

source documents of commercial psychological tests or working notes of staff.

(B)(i) Unless otherwise ordered by a court of competent jurisdiction, records and information generated by other agencies and obtained under this section shall not be available to the sex offender or sexually violent predator except through the agency or individual having primary custody of the records.

(ii) Upon request, the sex offender shall be given a list of the records or information obtained.

(C) If the record or information generated contains the address of a victim or a person who has made a statement adverse to the sex offender or sexually violent predator, the address shall be redacted and the sex offender or sexually violent predator shall have access to records and information other than the identity and address.

(e) In classifying the sex offender into a risk level for the purposes of public notification under § 12-12-913, the committee, through its staff, shall review each sex offender or sexually violent predator under its authority:

(1) Prior to the sex offender's release for confinement in a correctional facility;

(2) Prior to the release of a person who has been committed following an acquittal on the grounds of mental disease or defect;

(3) At the start of a sex offender's suspended imposition of sentence; or

(4) At the start of a sex offender's probation period.

(f)(1)(A) The committee shall issue the offender fact sheet to the local law enforcement agency having jurisdiction.

(B) The offender fact sheet is provided to assist the local law enforcement agency having jurisdiction in its task of community notification.

(2) The committee shall provide the Parol [FN1] Board with copies of the offender fact sheet on inmates of the Department of Correction.

(3) The committee shall provide the Department of Community Correction with copies of the offender fact sheet on any sex offender under the Department of Community Correction's supervision.

(4)(A)(i) The offender fact sheet shall be prepared on a standard form for ease of transmission and communication.

(ii) The offender fact sheet shall also be on an Internet-based application accessible to law enforcement, state boards, and licensing agencies.

(iii) The offender fact sheet of a sexually violent predator and a sex offender found by the center to be in violation of the registration requirement shall be made available to the general public unless the release of the offender fact sheet, in the opinion of the committee based on a risk assessment, places an innocent individual at risk.

(B) The standard form shall include, but not be limited to:

(i) Registration information as required in § 12-12-908;

(ii) Risk level;

(iii) Date of deoxyribonucleic acid (DNA) sample;

(iv) Psychological factors likely to affect sexual control;

(v) Victim age and gender preference;

(vi) Treatment history and recommendations; and.

(vii) Other relevant information deemed necessary by the committee or by professional staff performing sex offender assessments.

(5)(A) The committee shall ensure that the notice is complete in its entirety.

(B) A law enforcement officer shall notify the center if a sex offender has moved or is otherwise in violation of a registration requirement.

(6)(A) All material used in the assessment shall be kept on file in its original form for one (1) year.

(B) After one (1) year the file may be stored electronically.

(g)(1) In cooperation with the committee, the Department of Correction shall promulgate rules and regulations to establish the review process for assessment determinations.

(2)(A) The sex offender or sexually violent predator may request an administrative review of the assigned risk level under the conditions stated and following the procedures indicated under § 12-12-922.

(B) The sex offender shall be notified of these rights and procedures in the documentation sent with the notification of risk level.

(h)(1)(A) A sex offender or sexually violent predator may request the committee to reassess the sex offender's assigned risk level after five (5) years have elapsed since initial risk assessment by the committee and may renew that request one (1) time every five (5) years.

(B) In the request for reassessment, the sex offender shall list the facts and circumstances that demonstrate that the sex offender no longer poses the same degree of risk to the community.

(2) The committee shall also take into consideration any subsequent criminal act by the sex offender or sexually violent predator who has requested reassessment.

Acts of 1997, Act 989, § 17; Acts of 1999, Act 1353, §§ 10, 11, eff. Sept. 1, 1999; Acts of 2001, Act 1743, § 12, eff. Aug. 13, 2001; Acts of 2003 (2nd Ex. Sess.), Act 21, § 8, eff. June 3, 2004; Acts of 2005, Act 1962, §§ 36, 37, eff. Aug. 12, 2005; Acts of 2006 (1st Ex. Sess.), Act 4, § 5, eff. April 7, 2006

ARK. CODE ANN. § 12-12-922. Alternative procedure for sexually violent predator evaluations

(a)(1) The alternative procedure under this section may be used for sexually violent predator evaluations if information that was not available to the court at the time of trial emerges in the course of a sex offender evaluation.

(2)(A) Examiners qualified by the Sex Offender Assessment Committee shall include in the assessment of any sex offender convicted of a sex offense a review as to whether the frequency, repetition over time, severity of trauma to the victim, or established pattern of predatory behaviors suggests that the sex offender suffers from a mental abnormality or personality disorder that makes the sex offender likely to engage in future predatory sexual offenses.

(B) If a mental abnormality or personality disorder is suspected, a licensed psychologist or psychiatrist qualified by the committee shall conduct further assessment to determine the presence or absence of a mental abnormality or personality disorder.

(C) The report of the assessment shall be presented to the committee, which shall make the determination of a mental abnormality or personality disorder according to protocols established by the committee and published in the committee guidelines.

(b)(1)(A) A sex offender may challenge an assigned risk level by submitting a written request for an administrative review.

(B) As part of the request for an administrative review, the sex offender may request in writing copies of all documents generated by the examiners, a listing by document name and

source of all documents that may be available from other agencies having custody of those documents, and a copy of the tape of the interview.

(2) The request for an administrative review shall be made in accordance with instructions provided on the risk level notification and within fifteen (15) days of receipt of the advisement of risk level notification to the sex offender by certified mail.

(3)(A) The basis of the request for administrative review shall be clearly stated and any documentary evidence attached.

(B) The basis for administrative review is:

(i) The rules and procedures were not properly followed in reaching a decision on the risk level of the sex offender;

(ii) Documents or information not available at the time of assessment have a bearing on the risk that the sex offender poses to the community; or

(iii) The assessment is not supported by substantial evidence.

(4) Unless a request for an administrative review is received by the committee within twenty (20) days of receipt of the advisement of risk level notification by the sex offender sent by certified mail or delivered by personal service, an offender fact sheet shall be made available to law enforcement so that community notification may commence.

(5) If a request for an administrative review is received by the committee, law enforcement may make community notification only at the level immediately below the level upon which review has been requested.

(6)(A) A member of the committee shall conduct the review and respond within thirty (30) days of receiving a request for an administrative review.

(B) If additional time is needed to obtain facts, the committee shall notify the sex offender requesting the review.

(7)(A)(i) The findings of the administrative review shall be sent to the sex offender by certified mail. Community notification shall commence five (5) calendar days after the postmark of the advisement of the findings of the administrative review.

(ii) Upon receipt of the findings, the sex offender has thirty (30) days to file a petition under the Arkansas Administrative Procedure Act, § 25-15-201 et seq., for judicial review in the Pulaski County Circuit Court or in the circuit court of the county where the sex offender resides or does business.

(B) The circuit court shall refuse to hear any appeal of an assigned risk level by a sex offender unless the circuit court finds that the administrative remedies available to the sex offender under this subsection have been exhausted.

(8)(A)(i) A copy of the petition for judicial review shall be served on the executive secretary of the committee inaccordance with the Arkansas Rules of Civil Procedure.

(ii) When the petition for judicial review has been served on the executive secretary of the committee, a record of the committee's findings and copies of all records in its possession shall be furnished by the committee to the circuit court within thirty (30) days of service.

(B) The committee may ask the circuit court to seal statements of victims, medical records, and other items that could place third parties at risk of harm.

(9) A ruling by the circuit court on the petition for judicial review is considered a final judgment.

Acts of 2003 (2nd Ex. Sess.), Act 21, § 12, eff. June 3, 2004; Acts of 2005, Act 1962, § 39, eff. Aug. 12, 2005; Acts of 2006 (1st Ex. Sess.), Act 4, § 6, eff. April 7, 2006.

ARK. CODE ANN. § 5-14-128. Registered sex offenders prohibited from living near schools or day cares

(a) It is unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to reside within two thousand feet (2,000') of the property on which any public or private elementary or secondary school or daycare facility is located.

(b)(1) It is not a violation of this section if the property on which the sex offender resides is owned and occupied by the sex offender and was purchased prior to the date on which the public or private elementary or secondary school or daycare facility was established.

(2) The exclusion in subsection (b)(1) of this section does not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense after the public or private elementary or secondary school or daycare facility is established.

(c)(1) It is not a violation of this section if the sex offender resides on property he or she owns prior to July 16, 2003.

(2) The exclusion in subsection (c)(1) of this section does not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense after July 16, 2003.

(d) A sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who knowingly violates a provision of this section is guilty of a Class D felony.

Acts of 2003, Act 330, § 3, eff. July 16, 2003.

***Sex and Child Offender Guidelines and Procedures*, Code Ark. R 004 00 002 at 8 (2002) (reproduced in part)**

RISK ASSESSMENT, ADULT

Assessments of adult offender risk will be based on actuarial analyses, information obtained from interview, psychological testing and evaluation, review of relevant records and historical data, and polygraph or penile plethysmograph, if deemed necessary by the team conducting the evaluation.

Sex and Child Offender Guidelines and Procedures, Code Ark. R. 004 00 002 at 14 (2002) (reproduced in part)

LEVEL OF RISK FOR ADULT AND JUVENILE OFFENDERS

Based on historical data and information obtained from the risk assessment process, offenders are assigned to the following levels of risk to the general public:

1. **Low risk:** Usually these are individuals with no prior history of sexual acting out, and no strong antisocial tendencies, sexual compulsions or psychological factors impairing judgement.

2. **Moderate risk:** Usually these are individuals with limited or circumscribed prior history of sexual acting out, possess some antisocial personality characteristics, predatory tendencies, or deviant sexual interest or behavioral patterns that increase the general level of risk these offenders pose. They may have mild or well controlled mental disorders, and / or developmental disabilities.

3. **High risk:** These individuals usually have histories of repeat sexual offending, and/or strong antisocial, violent or predatory personality characteristics. Sexual compulsions are likely to be present, but may be kept under control when relapse prevention plans are followed and treatment is continued. The offense patterns of these individuals reflect a relatively high probability of re-offense and/or a risk of substantial injury to victims should re-offense occur.

4. **Sexually Violent Predator:** These are individuals with impaired judgment or control who have sexual or violent compulsions that they lack the ability to control. This may be

due to pedophilia or other disorder of sexual attraction, mental illness or personality disorder that distorts thinking, interferes with behavioral control, and predisposes the person to acts of predatory sexual violence.

(2)

No. 06-769

FILED
MAR 2 3 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DONALD WEEMS and MICHAEL BRIGGS,

Petitioners,

v.

LAWRENCE JOHNSON, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

OFFICE OF THE CITY ATTORNEY
THOMAS M. CARPENTER
City Attorney
500 West Markham, Ste. 310
Little Rock, Arkansas 72201
(501) 371-4527

Counsel for Respondent Lawrence Johnson, in his official capacity as Chief of Police; and Little Rock Police Department

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

ARGUMENT

REASONS TO DENY THE PETITION

I. Any difference in the procedures used by different states to identify, classify, and assess sexual offenders does not create a procedural due process argument, and as a matter of state law is not subject to federal constitutional review.

The petitioners[1] ("Weems") contend that the Arkansas systems of sexual offender registration, and the assessment process, violate procedural due process guarantees of the U.S. Constitution. In doing so, Weems suggests that there is a conflict between the Third and Eighth Circuit Courts of Appeal, as well as several states, because different burdens of proof, or appellate remedies, are used by different states. As will be shown below, there is no conflict between the federal circuits. As to the state law cases, these merely demonstrate different statutory approaches by different states.

This Court has already recognized that "sex offenders are a threat to this Nation." *McKune v. Lile*, 536 U.S. 244, 32 (2002). In dealing with such a threat, "states are not denied by principles of procedural due process from"

---

[1] The Court should note that even before the U.S. Court of Appeals for the Eighth Circuit rendered its opinion, petitioner Donald Weems was incarcerated by the State of Arkansas for a new conviction of kidnapping and felony sexual solicitation of a child. His prison sentence is due to expire on May 12, 2008. http://www.arkansas.gov/doc/inmate_info/search.php?dcnum=132606&lastname=Weems&firstname=Donald&sex=M&agetype=1&RACE=W&_utma=7441378.75555919.1160167741.1170965704.1174581209.6&_utmz=7441378.1174581209.6.3.utmccn%3D%28referral%29%7Cutmcsr%3Daccessarkansas.org%7Cutmcct%3D%2Fgovernment_name.php%7Cutmcmd%3Dreferral (last accessed March 22, 2007).

drawing classifications as to these offenders, or from providing different means to enforce these classifications. *See Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989). This Court has already upheld state statutes that require special post-incarceration procedures to be followed by sex offenders. *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003).

Weems contends that the Arkansas approach to registration, setback requirements for living near certain protected groups, and classification of offenders, violates procedural due process because an offender never has an opportunity to be represented by counsel, or to see all of the documentary evidence used in the initial assessment. (Pet. Brief at 8). This assertion simply misrepresents the process.

First, the State does not engage in a whimsical decision as to classification. More to the point, the information required for such a review is easily identifiable. The SEX OFFENDER ASSESSMENT COMMITTEE GUIDELINES AND PROCEDURES 2007 is readily accessible. http:www.sos.arkansas.gov/ar_rules/proposed1004.00.07_001P.pdf (last accessed on March 22, 2007). These guidelines and procedures set forth the makeup of the committee, the offenses targeted for consideration, and the various procedures to be followed once an assessment is made. Information gathering is set out in detail. The offender is granted a Fifth Amendment right against self-incrimination so that comments made during an interview are never used to prosecute. Id. at 9. If, at the end of the process the offender is not satisfied with an assessment, a judicial review is permitted under the Arkansas Administrative Procedures Act. Ark. Code Ann. §§ 25-15-201 to -218 (West 2004).

At this hearing, the offender is entitled to counsel. While the burden is on the offender to show that there is no substantial evidence to support the Assessment Committee's conclusion, this standard is not impossible to meet. If the offender can demonstrate a reasonable suspicion of bias on the part of the Committee, making the hearing unfair, the trial court can reverse the decision. *Wacaser v. Ins. Comm'r*, 321 Ark. 143, 900 S.W.2d 191 (1995). If there were certain Committee members whose opinion weighed more heavily than others, the offender is entitled *as a matter of law* to present impeaching evidence. *Cyphers v. United Parcel Service*, 68 Ark.App. 62, 3 S.W.3d 698 (1999). The offender is provided a copy of the entire record at agency expense. *See* Ark. Code Ann. § 25-15-212 (d) (West 2004). With this evidence, and the additional grounds for reversal noted above, the offender will attempt to show that the Committee decision is not supported by substantial evidence. *Arkansas Soil & Water Conservation Comm'n v. City of Bentonville*, 351 Ark. 289, 92 S.W.3d 47 (2002). This means that the Committee's evidence does not support its finding. Id., at 301, 54.

This review is in addition to the administrative review the offender can request *before* the classification becomes effective in the first place. SEX OFFENDER ASSESSMENT COMMITTEE GUIDELINES & PROCEDURES at 16. In addition, once an assessment is made, the offender may petition the Committee for a decrease in classification after certain treatments are completed; evidence shows that any action was a temporary aberration; the assessment varies from the *current* state of the record, e.g., a witness recants; or, that the sex offense was without violence and was not indicative of a pattern of behavior. Id. at 14.

To be sure, the Arkansas process is not the same as the states listed by Weems in his petition. The U.S. Constitution does not require that it has to be. Indeed, if you accept this argument, then the Court would have to contend that every state have the same procedure to deal with every offense. It is clear that has never been the intent of the Constitution. Even at its inception, the document recognized, for example, that some states would authorize capital punishment and some would not. The Fifth Amendment guarantee was a limitation on those states that did, and that limitation was merely that it be imposed with due process of law. In other words, different procedures in different states does not raise a constitutional question that this Court has to consider.

Weems is also concerned about how "future dangerousness" is determined. Evidently, he thinks that more guidance should be given to the fact finder of such a significant issue. Yet, in another context, this Court has already rejected such a claim. For example, this Court upheld the Texas death penalty statute even though it required the jury to impose death upon certain findings, one of which was future dangerousness. *Jurek v. Texas*, 428 U.S. 262 (1976). The fact that a jury might act on speculative basis when it makes such a finding does not constitute a due process violation. *Estelle v. Smith*, 454 U.S. 454, 472-73 (1981).

More to the point, the Court has expressly noted that it does not substitute its view for those of state legislatures that impose capital sentencing and decide which "particular substantive factors [are] chosen to narrow the class of defendants eligible for the death penalty." *California v. Ramos*, 463 U.S. 992, 999-1000 (1983). The fact that not all states have statutes with the same procedure does

not create a constitutional problem. "The deference we owe to the decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'" *Gregg v. Georgia*, 428 U.S. 153, 192 (1976); *California v. Ramos*, 463 U.S. at 1000.

For this discussion, the relevant fact is that how these procedures are put into place, as this Court has stated, are "peculiarly questions of legislative policy." If a jury, without any guidance whatsoever as to the meaning of future dangerousness, can constitutionally sentence a man to death, then surely the State of Arkansas, governed by guidelines and procedures, can determine that a sexual offender meets a particular category of danger to the community and, in the process, impose different post-conviction requirements. If other states require other procedures, it is because the legislative bodies in those states made different decisions. It is not a federal constitutional issue. Indeed, it is peculiarly a state law issue.

CONCLUSION

For the reasons set forth above, the writ should be denied. Weems confuses different approaches by different state legislatures as a conflict among the federal circuit courts which warrants this Court's review. It is not. This petition merely asks this Court to rule the Arkansas procedure to be unconstitutional. Yet, as demonstrated above, no federal constitutional rationale for such a ruling is ever provided.

Respectfully submitted,

OFFICE OF THE CITY ATTORNEY
500 West Markham, Ste. 310
Little Rock, Arkansas 72201
(501) 371-4527

By: THOMAS M. CARPENTER
CITY ATTORNEY
Arkansas Identification No. 77024

Counsel for Respondent Lawrence Johnson, in his official capacity as Chief of Police; and Little Rock Police Department

9

(3)

No. 06-769

FILED
MAR 2 3 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DONALD WEEMS and MICHAEL BRIGGS,

Petitioners,

v.

LAWRENCE JOHNSON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT CITY OF PINE BLUFF IN OPPOSITION

BEST AVAILABLE COPY

NGA OSTOJA-STARZEWSKI
Post Office Box 38
N. Little Rock, Arkansas 72115
(501) 978-6125
Attorney for Respondent City of Pine Bluff

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities i

Summary of the Argument 1

Reasons For Denying The Petition 1

Conclusion 3

TABLE OF AUTHORITIES

CASES

Monell v. Department of Social Services, 436 U.S. 658 (1978) 1

STATUTES

42 U.S.C. § 1983 1

Ark. Code Ann. § 12-12-906 2

Ark. Code Ann. § 12-12-917 ..... 2, 3

Ark. Code Ann. § 12-12-921 2

SUMMARY OF THE ARGUMENT

Assessing whether a sex offender constitutes a violent sexual predator under the Arkansas Sex and Child Offender Registration Act is a determination made by the Sex Offender Screening and Risk Assessment ("SOSRA"), a unit located in the Arkansas Department of Correction. The Sex Offender Assessment Committee, members of which are appointed by the Governor of the State of Arkansas, causes the assessments to be conducted and oversees the assessment process.

The City of Pine Bluff does not have any statutory authority to perform assessments of sex offenders under the Registration Act. Since Petitioners are challenging a state statute and assessments which are performed by the State of Arkansas pursuant to state statute, the petition for writ of certiorari should be denied as to Separate Respondent, the City of Pine Bluff.

REASONS FOR DENYING THE PETITION

A city cannot be held liable under 42 U.S.C. § 1983 unless a municipal policy or custom is the moving force behind the alleged constitutional violation. *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978).

In the present case, the petition for writ of certiorari presents only one question: "What are the minimal procedural due process protections required in 'dangerousness' assessments of sex offenders where the assessments are material to the application of regulatory statutes against sex offenders?"

The City of Pine Bluff does not assess the "dangerousness" of sex offenders. By statute, the Sex Offender Assessment Committee is solely responsible for causing "dangerousness" assessments to be conducted under the Sex and Child Offender Registration Act. Ark. Code Ann. § 12-12-917(b)(1). The Committee is comprised of nine (9) persons and includes the Director of the Department of Correction or the director's designee, the Director of the Department of Community Correction or the director's designee, and the Director of the Arkansas Crime Information Center or the director's designee. In addition, the Governor of the State of Arkansas appoints, subject to state senate confirmation, a criminal defense attorney, a prosecuting attorney, a licensed health professional with demonstrated expertise in the treatment of sex offenders, a victims' rights advocate, a law enforcement officer, and a member with expertise in juvenile justice or treatment, to serve on the Committee. Ark. Code Ann. § 12-12-921. The Committee reports to the Governor and legislative council. *Id.*

With oversight from the Committee, the assessments are performed by the Sex Offender Screening and Risk Assessment, a unit located at the Arkansas Department of Correction. Ark. Code Ann. §§ 12-12-906(a)(1)(D)(i) and 12-12-917(b)(2)(A)(ii)(a) and (b)(4)(A).

The City of Pine Bluff has no authority to make "dangerousness" assessments of sex offenders or to cause such assessments to be made under the Registration Act. Only the Sex Offender Assessment Committee and the Sex Offender Screening and Risk Assessment unit have been statutorily vested with such authority. Petitioners themselves maintain that it is the State of Arkansas which makes a "case-by-case assessment of the 'public risk posed'

by an offender." Petition for Writ of Certiorari, p. 3, citing Ark. Code Ann. § 12-12-917(b)(1).

Petitioners are challenging the constitutionality of *state* statutes and the *State's* application of same. The statutes providing for the assessment of sex offenders are not policies, practices, or customs of the City of Pine Bluff, but laws enacted by the State of Arkansas. The injuries which Petitioners allegedly suffered were not undertaken pursuant to any policy, practice, or custom of the City of Pine Bluff. Therefore, since Petitioners' claim is not attributable to any unconstitutional *municipal* policy, practice, or custom, their Petition as to the City of Pine Bluff should be dismissed.

CONCLUSION

Petitioners do not challenge the constitutionality of any conduct undertaken by the City of Pine Bluff, but instead question what due process protections are required during sex offender assessments conducted by the State of Arkansas. Therefore, the petition for writ of certiorari should be denied as to Respondent, the City of Pine Bluff.

Respectfully submitted,

NGA OSTOJA-STARZEWSKI
Post Office Box 38
N. Little Rock, AR 72115
(501) 978-6125

Attorney for Respondent
City of Pine Bluff

(1)

No. 06-769

FILED
MAR 2 3 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

DONALD WEEMS and
MICHAEL BRIGGS,

Petitioners,

v.

LAWRENCE JOHNSON, CHIEF OF POLICE,
LITTLE ROCK POLICE DEPARTMENT, et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

BRIEF FOR RESPONDENTS PAULA STITZ, LARRY B. NORRIS, G. DAVID GUNTHARP, AND SHERI J. FLYNN IN OPPOSITION

DUSTIN MCDANIEL
Attorney General of Arkansas

C. JOSEPH CORDI, JR.
Assistant Attorney General
Counsel of Record

ARKANSAS ATTORNEY GENERAL'S OFFICE
323 Center Street, Suite 200
Little Rock, AR 72201
(501) 682-2007

BEST AVAILABLE COPY

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

What procedural protections does the Fourteenth Amendment require during sex-offender risk assessments that are subject to administrative review, judicial review by state trial- and appellate-level courts, and further judicial review by the Supreme Court where those assessments are material to a determination of whether the offender may lawfully reside within 2000 feet of a school or daycare facility?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction	1
Regulations Involved	1
Statement	1
Reasons for Denying the Petition	11
Conclusion	22

TABLE OF AUTHORITIES

Page

CASES:

Arkansas Department of Correction v. Claybaugh, 93 Ark. App. 11, ___ S.W.3d ___ (2005) 11

Doe v. Pataki, 3 F.Supp.2d 456 (S.D.N.Y. 1998) 17, 18, 19, 20, 21

Doe v. Poritz, 142 N.J. 1, 662 A.2d 367 (New Jersey 1995) 17, 18

Mathews v. Eldridge, 424 U.S. 319 (1976) ... 15, 17, 19, 20, 21

Nobel v. Board of Parole and Post-Prison Supervision, 327 Ore. 485, 964 P.2d 990 (1998) 20, 21

Roe v. Arkansas Department of Correction, 367 Ark. 348, ___ S.W.3d ___ (2006) 10

Weems v. Johnson, 453 F.3d 1010 (8th Cir. 2006) 21

STATUTES, REGULATION, AND RULE:

Arkansas Administrative Procedure Act:

Ark. Code Ann. § 25-15-201 9

Ark. Code Ann. § 25-15-212 ..... 9, 10

Arkansas Child Maltreatment Act:

Ark. Code Ann. § 12-12-506 14

Arkansas Sex Offender Registration Act:

Ark. Act No. 989, § 1 (1997) 2

Ark. Code Ann. § 12-12-901 2

Ark. Code Ann. § 12-12-902 2

Ark. Code Ann. § 12-12-903 2

TABLE OF AUTHORITIES – Continued

Page

Ark. Code Ann. § 12-12-904 3

Ark. Code Ann. § 12-12-905 3

Ark. Code Ann. § 12-12-906 3

Ark. Code Ann. § 12-12-908 3

Ark. Code Ann. § 12-12-913 .....2, 3, 7

Ark. Code Ann. § 12-12-917 .....*passim*

Ark. Code Ann. § 12-12-918 ..... 4, 13

Ark. Code Ann. § 12-12-919 11

Ark. Code Ann. § 12-12-922 .....8, 9, 11

Arkansas Criminal Code:

Ark. Code Ann. § 5-14-128 8

Rules of the United States Supreme Court:

Rule 10..... 21

Sex Offender Guidelines & Procedures for Implementing Risk Assessment & Community Notification Regarding Sex Offenders (June 2004) ("*Guidelines*") .....*passim*

OPINIONS BELOW

The decision of the court of appeals (Pet. 1a-18a) is reported at 453 F.3d 1010. The district court's Memorandum Opinion and Order granting the Respondents' motions to dismiss (Pet. 19a-57a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2006. Rehearing and rehearing en banc were denied on August 18, 2006. Justice Alito extended the time within which to file a petition for writ of certiorari until November 30, 2006, and the petition was filed on that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

REGULATIONS INVOLVED

The *Sex Offender Guidelines & Procedures for Implementing Risk Assessment & Community Notification Regarding Sex Offenders* (June 2004) ("*Guidelines*") are reproduced in the appendix at 1a.

STATEMENT

The Arkansas General Assembly has determined that "sex offenders pose a high risk of reoffending after release from custody," that "protecting the public from sex offenders is a primary governmental interest," that "the privacy interest of persons adjudicated guilty of sex offenses is less important than the government's interest in public safety,"

and that "the release of certain information about sex offenders to criminal justice agencies and the general public will assist in protecting the public safety." Ark. Code Ann. § 12-12-902 (LEXIS through 2006 First Extraordinary Session). Thus, the General Assembly enacted the Sex and Child Offender Registration Act of 1997, Ark. Act No. 989, § 1 (1997), which is now known as the "Sex Offender Registration Act of 1997."[1] Ark. Code Ann. § 12-12-901 (2006). As provided in the Act, Ark. Code Ann. § 12-12-913(c)(3), rules and regulations for implementing the Act have been promulgated by the Sex Offender Assessment Committee. *Sex Offender Guidelines & Procedures for Implementing Risk Assessment & Community Notification Regarding Sex Offenders* (June 2004) ("*Guidelines*"). State Res. 1a.[2] The *Guidelines* identify factors relevant to a sex offender's "future dangerousness and likelihood of reoffense or threat to the community" and "also address the extent of the information to be disclosed and the scope of the community to whom disclosure shall be made[.]" Ark. Code Ann. § 12-12-913(c)(2).

---

[1] As of this writing, the Arkansas General Assembly is in its 86th biennial regular legislative session. Thus far, it has passed Act 210, which, if approved by the Governor or otherwise enacted, would amend that part of the Act codified at Ark. Code Ann. § 12-12-903(12). The General Assembly also has passed, and the Governor has signed, Act 147, which, upon taking effect, will amend that part of the Act codified at Ark. Code Ann. § 12-12-913(g).

[2] The court of appeals' decision cites the January 2002 *Guidelines*, which were included in the Joint Appendix filed in that court. (Pet. 4a) A revised version of the *Guidelines*, however, went into effect in 2004. Thus, the State Respondents have reproduced those *Guidelines* in the appendix and, unless otherwise noted, will cite them throughout this brief. Another revision of the *Guidelines* has recently been made and is expected to be available online by following the link to "Sex Offender Guidelines" at: http://www.acic.org/Registration/.

The Act requires individuals who have been convicted of certain sex offenses to register with the State. *Id.* § 12-12-905(a) (2006). Failure to register is a felony offense. *Id.* § 12-12-904(a)(1)(A)(i). It is undisputed that the Act applies to the Petitioners.

The information that sex offenders are required to provide during registration includes their full name and all aliases; date of birth; gender; race; height; weight; hair and eye color; address; driver's license number; social security number; and, place of employment, education or training. *Id.* §§ 12-12-906(a)(1), -908(b). They are photographed and fingerprinted. *See id.* §§ 12-12-906(c)(1)(A)(iv), -908(b)(13) & (14). Sex offenders also are required to submit to an assessment designed to predict their future dangerousness and the risk that they will reoffend. *Id.* §§ 12-12-913(c)(2)(A), -917(b)(1).

Employees of the Arkansas Department of Correction perform risk assessments of adult sex offenders. *Guidelines* pgs. 3a, 20a; *see also* Ark. Code Ann. § 12-12-917(b)(2)(A)(ii) (requiring prosecuting attorneys and law-enforcement agencies to furnish their file concerning a sex offender to "Sex Offender Screening and Risk Assessment at the Department of Correction"). While conducting risk assessments of male sex offenders, examiners consider actuarial analyses, information obtained from interviews, psychological tests and evaluations, records and historical data, and, as appropriate, polygraphs or penile plethysmographs. *Guidelines* p. 20a. Risk assessments "screen for antisocial, psychopathic or other problematic personality characteristics, criminal thinking patterns, mental abnormalities affecting impulse control, sexual deviancies, paraphilias, preoccupation or compulsions, history of violence and other factors that may affect the level of risk

the offender poses to the community[.]" *Id.* at 21a (emphasis omitted). Assessments include intensive interviews "regarding patterns of behavior and life incidents[.]" *Id.* at 22a.

Offenders may be represented by counsel during the assessment process, but counsel is not allowed in the room while testing and interviews are conducted. *See* Ark. Code Ann. § 12-12-918(a)(2)(B) (providing that report to sentencing court recommending that an offender be classified as a sexually violent predator be forwarded "to the defense attorney"); *Guidelines* p. 8a (providing that some assessment records may be released to the offender and his attorney). Offenders have use immunity for statements about prior conduct made during the course of assessment. Ark. Code Ann. § 12-12-917(b)(4)(B); *see also Guidelines* p. 5a ("All information provided in the assessment has use immunity, which means that none of it can be used to prosecute the offender in a future court case or appeal"), p. 18a (informing sex offenders that statements made "with respect to prior conduct during the course of [the] assessment may not be used against [them] in any criminal case except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order granting immunity"), and p. 23a (stating that sex offenders have "'use immunity' which means that [admissions made during the interview] cannot be used against the individual in a court of law").

The records that the examiners may consider during risk assessments include, but are not limited to: police reports; statements of probable cause; presentence investigations and reports; judgments and sentences; current classification referrals; criminal history summaries; violation and disciplinary reports; all psychological evaluations

and psychiatric hospital reports; sex offender or sexually violent predator treatment program reports; juvenile court records; victim impact statements; investigation reports to the state's child abuse hotline; and, statements of medical providers treating victims of sex offenses indicating the extent of injury to the victim. Ark. Code Ann. § 12-12-917(c)(2). The examiners are not required to provide sex offenders with records generated by other agencies unless ordered by a court. *Id.* § 12-12-917(d)(2)(B)(i); *Guidelines* pgs. 54a-55a. Upon request, the examiners will give an offender or his counsel a list of records that they obtained from other agencies. *See* Ark. Code Ann. § 12-12-917(d)(2)(B)(ii). The examiners also will provide addresses of those agencies to them. *See Guidelines* p. 54a. The sex offender may then request a copy of the records from the appropriate agencies. Ark. Code Ann. § 12-12-917(d)(2)(B)(i). With the exception of restricted source documents of commercial psychological tests or working notes of staff, the Sex Offender Assessment Committee is required to give the sex offender access to records and information generated and maintained by the committee, including any reports of the assessment and the tape of the interview. *Id.* § 12-12-917(d)(2)(A); *see also Guidelines* p. 54a (stating that the Sex Offender Assessment Committee will not provide sex offenders with copies of "copyrighted psychological tests that are restricted to licensed professionals.")

The *Guidelines* describe four risk classifications, ranging from Level 1 (low risk), to Level 4 (sexually violent predator). *Guidelines* pgs. 23a-24a. The assessments of Weems and Briggs determined that they would be classified at Level 3 (high risk). (Pet. 7a.) The *Guidelines* define Level 3 as follows:

> 3. **High risk:** These individuals usually have histories of repeat sexual offending, and/or strong antisocial, violent or predatory personality characteristics. Sexual compulsions are likely to be present, but may be kept under control when relapse prevention plans are followed and treatment is continued. The offense patterns of these individuals reflect a relatively high probability of re-offense and/or a risk of substantial injury to victims should re-offense occur.

Guidelines p. 24a (emphasis in original).

The *Guidelines* recognize that "[s]ome flexibility is required in the risk assessment procedure to take into account special circumstances of a particular case that either are not sufficiently considered, or require more emphasis than afforded, in the actuarial prediction model." *Id.* at 25a (emphasis omitted). Thus, "[t]he actuarially based portion of the risk assessment is subject to overrides and departures related to special circumstances, facts and psychological disorders affecting the level of risk posed by an individual." *Id.* at 5a (emphasis omitted). All overrides and departures must be approved by a licensed psychologist or psychiatrist. *Id.* Overrides and departures are subject to review by the Sex Offender Assessment Committee. *Id.* at 28a.

Examples of behavior by an offender that may justify an override, or increase, of his risk classification include: prior commission of sex offenses, making statements that suggest a higher risk level than that predicted by the actuarial model, committing an offense involving extreme physical injury or death, and deliberately providing false information to the examiner. *Id.* at 25a-26a. In addition,

"If the clinical team determines that the offender suffers from a mental abnormality, physical condition, addiction or other psychological impairment that decreases his/her ability to control sexual impulses, or increases his/her potential for sexual violence, his/her risk level may be increased." *Id.* at 26a (emphasis omitted).

Examples of circumstances that may justify a departure, or decrease, of a sex offender's risk classification include: treatment that significantly decreases his predisposition to re-offend, his offense pattern suggests that his conduct was a temporary aberration, and a recantation by the victim. *Id.* at 26a-27a.

Higher risk levels lead to more widespread notice to the public that the individual is a sex offender. *Id.* at 38a; *see also* Ark. Code Ann. § 12-12-913(c)(2)(B)(i) (requiring the *Guidelines* to account for the "[l]evel of the sex offender's dangerousness" when addressing the extent of information about him to be disclosed to the community and the scope of the community to whom that disclosure will be made). In the case of a Level 1 sex offender, the *Guidelines* generally call for notification to law-enforcement agencies in the offender's jurisdiction, adult members of the offender's household, and victims or guardians of victims. *Guidelines* pgs. 39a-40a. If the offender is classified as Level 2, then notification also includes the heads of agencies and organizations that serve individuals in the offender's target group, state licensing boards and prospective employers that have asked to receive notification or those that might bring the offender and potential victims into contact with one another, and the heads of families with members who are of the age and gender of the offender's target group and who are likely to encounter the offenders. *Id.* at 40a. Level

3 classifications result in additional notification to any member of the community who the offender is likely to encounter. *Id.* 40a-41a. In the event of Level 4 classification, additional notification is given to members of the general public in the vicinity of where the offender lives, travels and works. *Id.* at 41a. Community meetings may be used to notify the public with regard to Level 4 offenders. *Id.* at 42a. Community notification concerning Level 3 and 4 offenders includes putting information concerning them on the internet. *Id.* at 41a.

Arkansas Code Annotated § 5-14-128 (2006) provides, with certain exceptions, that it is a felony offense for Level 3 and 4 sex offenders to reside within 2000 feet of property on which a school or daycare facility is located.[3] (Pet. 77a)

A sex offender may request an administrative review of the assessment by a member of the Sex Offender Assessment Committee. Ark. Code Ann. §§ 12-12-917(g)(2)(A), -922(b)(6)(A). The offender must clearly state the basis of his request and attach any documentary evidence supporting it. *Id.* § 12-12-922(b)(3)(A). Grounds for administrative review of the assessment are:

> (i) The rules and procedures were not properly followed in reaching a decision on the risk level of the sex offender;
>
> (ii) Documents or information not available at the time of assessment have a bearing on the

[3] The Petitioners erroneously assert that the 2000 foot residency restriction is part of the Sex Offender Registration Act. (Pet. 3) It is not. The residency restriction is codified in Title 5 of the Arkansas Code. The Sex Offender Registration Act is codified in Title 12.

> risk that the sex offender poses to the community; or
>
> (iii) The assessment is not supported by substantial evidence.

Id. § 12-12-922(b)(3)(B).

The administrative review is based on the assessment record previously compiled. No testimony is taken. *Guidelines* p. 33a. The offenders may, however, request "a copy of each document generated by the examiners, a listing by document name and source of any document available from another agency having custody of the document, and a copy of the tape of the interview." Ark. Code Ann. § 12-12-922(b)(1)(B). If the reviewer determines that the assessment level should not be changed, then he or she notifies the offender. *Guidelines* p. 33a. If the reviewer determines that the assessment level should be changed, then he or she forwards that recommendation to the committee for a vote on the question. *Id.* "If a request for an administrative review is received by the committee, law enforcement may make community notification only at the level immediately below the level upon which review has been requested." Ark. Code Ann. § 12-12-922(b)(5).

Pursuant to Ark. Code Ann. § 12-12-922(b)(7)(A)(ii), sex offenders who are not satisfied with the results of an administrative review may obtain judicial review from a state circuit court under Arkansas' Administrative Procedure Act, which is codified at Ark. Code Ann. § 25-15-201, *et seq.* (Repl. 2002 & Supp. 2005). The circuit court's review is on the administrative record, unless there is an allegation that there was an irregularity in the administrative proceedings that does not appear in the record, in which case testimony may be taken. *Id.* § 25-15-212(g)

(Repl. 2002). If requested, the court will hear argument and receive briefs. *Id.* The court may grant a sex offender's request for leave to present additional evidence to the Sex Offender Assessment Committee if the court finds that the evidence is material and that there were good reasons for failure to present it in the administrative proceedings. *See id.* § 25-15-212(f). In that event, the committee may "modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court." *Id.* The court may

> affirm the decision of the agency or remand the case for further proceedings. It may reverse or modify the decision if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the agency's statutory authority;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error or law;
>
> (5) Not supported by substantial evidence of record; or
>
> (6) Arbitrary, capricious, or characterized by abuse of discretion.

Ark. Code Ann. § 25-15-212(h) (Repl. 2003).

Sex offenders may appeal the circuit court's orders to Arkansas' Court of Appeals or Supreme Court. *See, e.g.*, *Roe v. Arkansas Department of Correction*, 367 Ark. 348,

___ S.W.3d ___ (2006) (sex offender's appeal to Arkansas Supreme Court dismissed for lack of final order); *Arkansas Department of Correction v. Claybaugh*, 93 Ark. App. 11, 29-30, ___ S.W.3d ___ (2005) (reversing sex offender's risk assessment); *see also* Ark. Code Ann. § 12-12-922(b)(9) (providing that "[a] ruling by the circuit court on the petition for judicial review is considered a final judgment."). Sex offenders also may appeal to this Court.

Lifetime registration is required for sex offenders found to have committed an aggravated sex offense, determined by a court to be a sexually violent predator, or found to have been adjudicated guilty of a second or subsequent sex offense under a separate case number. Ark. Code Ann. § 12-12-919(a). Other sex offenders who were convicted in Arkansas may apply to the sentencing court for an order terminating the obligation to register fifteen years "after release from incarceration or other institution or fifteen (15) years after having been placed on probation or any other form of community supervision[.]" *Id.* § 12-12-919(b)(1)(A)(i). Sex offenders who were convicted in another state but permanently reside in Arkansas may apply to a court in the county in which they reside for an order terminating their obligation to register. *Id.* § 12-12-919(b)(1)(A)(ii). Sex offenders also may request reassessment every five years after their initial assessment. *Id.* § 12-12-917(h).

REASONS FOR DENYING THE PETITION

The question presented by the Petitioners concerns only the procedural protections afforded to sex offenders during the initial risk assessment. The Petitioners frame

their question presented in terms of "'dangerousness' assessments," not the administrative or judicial review thereof. (Pet. i) When explaining why they believe certiorari should be granted, the Petitioners restate their question by asking: "Under the U.S. Constitution, what are the minimal procedural due process protections required *in risk or dangerousness assessments* of sex offenders where the assessments are material to the application of regulatory statutes against sex offenders?" (Pet. 6, emphasis added.) In discussing this question, the Petitioners assert that "[t]here are no provisions within the Registration Act or the Sex Offender Guidelines and Procedures that allow a sex offender to be represented by an attorney, to confront witnesses, or to see all of the documentary evidence *used in the initial assessment*." (Pet. 8, emphasis added.) (As noted below, these contentions are in error.) Petitioners concede that judicial review under Arkansas' Administrative Procedure Act is available during which offenders are "allowed to have counsel, confront witnesses, and receive copies of the evidence to be used against them." (Pet. 8, n.4) Thus, there can be no doubt that the Petitioners' question is limited to the procedural protections in place during initial risk assessments.

There is no split of authority concerning the procedures required by the Fourteenth Amendment during sex-offender risk assessments; and, the question of the appropriate burden of proof during those assessments is not compelling as demonstrated by the fact that the Petitioners did not raise or brief that question in the Eighth Circuit.

A. There is not a split of authority concerning the procedures required by the Fourteenth Amendment during sex-offender risk assessments because the assessment procedures at issue in the cases that the Petitioners contend conflict with the Eighth Circuit's decision are remarkably different from Arkansas' assessment procedures.

1. Neither the Sex Offender Registration Act nor the *Guidelines* prohibit sex offenders from having assistance of counsel while preparing for the assessment, from obtaining copies of the documents considered by the examiners, or from challenging statements contained in those documents.

Sex offenders may be represented by counsel. *See* Ark. Code Ann. § 12-12-918(a)(2)(B); *Guidelines* p. 8a. With limited exceptions for copyrighted psychological tests and working notes of staff, the offender and his attorney have access to all Sex Offender Assessment Committee records used in the assessment. *See* Ark. Code Ann. § 12-12-917(d)(2)(A); *Guidelines* p. 54a. The examiners also provide sex offenders and their attorneys with lists of records obtained from other agencies, as well as the addresses of those agencies. *See* Ark. Code Ann. § 12-12-917(d)(2)(B)(ii); *Guidelines* p. 54a. Hence, sex offenders and their attorneys may easily request copies of those records from the appropriate agencies. Moreover, many of the records considered by the examiners are routinely available to sex offenders and their attorneys during the course of sex-offense prosecutions. Those documents include police reports; statements of probable cause; pre-sentence investigations and reports; judgments and sentences; criminal history summaries; psychological evaluations and psychiatric hospital reports; juvenile court records; victim impact

statements; and, statements of medical providers treating victims of sex offenses indicating the extent of injury to the victim. *See* Ark. Code Ann. § 12-12-917(c)(2) (listing documents considered during risk assessments). Other records, such as current classification referrals, violation and disciplinary reports, sex offender or sexually violent predator treatment program reports, and investigation reports to the state's child abuse hotline concern the offenders themselves and would thus customarily be available to them and their attorneys. *See id.*; *see also* Ark. Code Ann. § 12-12-506(a)(2)(A)(iii) (Supp. 2005) (providing that the subject of a true report made pursuant to the Arkansas Child Maltreatment Act may obtain a copy of the report).

Neither the Act nor the *Guidelines* prohibit sex offenders and their attorneys from submitting to the examiners any documents that they believe would support a lower risk assessment. Accordingly, for example, if a sex offender has information that rebuts a witness statement contained in a document to be considered by the examiners, then he may present that information to the examiner before or during the assessment interview.

It is the examiners' general practice not to allow counsel to accompany sex offenders during the assessment interview, but the Act and *Guidelines* do not prohibit sex offenders from consulting with counsel before the interview. Nothing prohibits sex offenders from leaving the room to consult with counsel before answering a question during an interview. Moreover, sex offenders have use immunity for statements about prior conduct made during the course of assessment. Ark. Code Ann. § 12-12-917(b)(4)(B); *see also Guidelines* pgs. 5a, 18a, & 23a.

For these reasons, the State Respondents respectfully submit that the Petitioners' suggestion that sex offenders are prevented from having any assistance from counsel, from examining documents considered during the assessment, and from challenging witness statements that appear in those documents is incorrect.

2. The decision of the Court of Appeals in this case, as well as purportedly conflicting decisions from other jurisdictions, turned on the application of the *Mathews v. Eldridge* balancing test to the unique facts of each case, and do not reflect any disagreement on the operative legal standards.

In *Mathews v. Eldridge*, this Court articulated a three-factor balancing test for determining whether existing procedures sufficiently guard against erroneous deprivations of life, liberty, or property:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id., 424 U.S. 319, 335 (1976). The Eighth Circuit applied this test to Arkansas' Sex Offender Registration Act and its implementation guidelines and held that they satisfy the Constitution's procedural due process requirements. (Pet. 14a-18a) As required by *Mathews v. Eldridge*, the

Eighth Circuit analyzed the specific procedures at issue in this case. The Eighth Circuit considered that

> [b]efore a team operating under the oversight of the Sex Offender Assessment Committee may assign a risk level to an offender, the team conducts a thorough review of official records and historical data, performs psychological testing and evaluation, undertakes actuarial analyses, and conducts a personal interview with the offender. The offender has an opportunity to be heard through the interview, and may access most records and information maintained by the committee. Ark. Code Ann. § 12-12-917(d)(2)(A). The examination team typically follows an actuarial prediction model based on objective criteria, but the Guidelines do permit "some flexibility" to account for "special circumstances" of a particular case that are not adequately considered in the model. These "overrides" and "departures" permit the examiners to increase or decrease the assigned level based on special circumstances. *Guidelines,* at 14-15. Any such adjustment must be "fully documented," and it is subject to review by the Sex Offender Assessment Committee. *Id.* at 15.

(Pet. 15a)

While sex offenders have "an interest in avoiding inaccurate community notification or an unwarranted residency restriction," the Eighth Circuit recognized that Arkansas' "Guidelines do not permit notification of a 'high risk' assessment, which triggers the residency restriction and may bring greater opprobrium than notification in accordance with Level 1 or 2 status, until after the conclusion of an administrative review." (Pet. 15a) The Eighth Circuit determined that "the risk of erroneous deprivation

is negligible" prior to administrative review because "[a]lthough examiners believe that the offender is a 'high risk,' the community may be notified only that the offender presents a 'moderate risk,' and the offender's criminal record – which almost certainly implies at least some level of risk – is already a matter of public record." (Pet. 15a-16a) Thus, Arkansas' administrative review "ensures that the sex offender's assessment is considered by both the examination team and the Sex Offender Review Committee before a Level 3 assessment is implemented." (Pet. 16a)

The Eighth Circuit also recognized that the focus of risk assessments in Arkansas is "on psychological evaluations and clinical judgments[.]" (Pet. 17a) Thus, the court determined that allowing sex offenders to bring attorneys and confront witnesses during the initial assessment would not be likely to "appreciably reduce the risk of an erroneous determination," but "would entail rather significant fiscal and administrative burdens." (Pet. 17a) Based on this through analysis of Arkansas' sex-offender-assessment procedures, the Eighth Circuit held that they satisfied the Procedural Due Process Clause. (Pet. 18a)

The New Jersey sex-offender-assessment procedures that were at issue in *Doe v. Poritz* are entirely different than Arkansas' procedures. Indeed, the New Jersey law at issue in that case required the prosecutor in the county in which a sex offender resided to determine his risk level. *Id.*, 142 N.J. 1, 22-23, 662 A.2d 367, 378 (New Jersey 1995). It is apparent that there could be no administrative review of a prosecutor's risk-level determination. Consequently, it comes as no surprise that the New Jersey Supreme Court held that application of the *Mathews v. Eldridge* balancing test to those facts led to the conclusion

that sex offenders in that State were entitled to judicial review unless assigned to that State's lowest risk level. *Poritz*, 142 N.J. at 107, 662 A.2d at 421. *Poritz* does not hold that due process mandates judicial hearings at the initial assessment stage; it only holds that a prosecutor's decision to provide community notification, including manner of notification, is subject to judicial review before such notification is given. *Id.*, 142 N.J. at 12, 107, 662 A.2d at 372, 421.

In contrast with New Jersey's practice of allowing prosecutors to perform risk assessments, Arkansas' "assessment is designed to be thorough and complex, drawing on historical records, psychological evaluations, and actuarial techniques. Deviations from the actuarial prediction models are designed to be 'used sparingly,' only with the approval of 'senior clinical staff,' and are subject to review by the Sex Offender Assessment Committee." (Pet. 16a) As a result, the New Jersey Supreme Court's decision in *Poritz* does not conflict with the Eighth Circuit's decision in *Weems*.

Two New York risk-assessment-procedure tracks were at issue in *Doe v. Pataki*, 3 F.Supp.2d 456, 471 (S.D.N.Y. 1998). One track was for sex offenders who were incarcerated when the New York Sex Offender Registration Act took effect. *Id.* at 459. An administrative board would recommend a risk level to the sentencing court, and the court would make a final risk-level determination. *Id.* at 462-63. There could be no appeal. *Id.* at 465. The issue with regard to sex offenders on this track concerned the judicial procedures at the sentencing court. *Id.* at 459-61. The *Pataki* court concluded that those procedures permitted

> a convicted sex offender to be classified at a risk level that subjects him to community notification on the basis of a perfunctory proceeding or incorrect information, that fails to provide a full and fair opportunity to be heard or legal representation, that places the burden on him to prove that the Board's findings were wrong without disclosing to him the bases for those findings, and that offers no avenue for appellate review even in the face of gross error does not pass constitutional muster.

Id. at 461.

The other track was for sex offenders who were on probation or parole when the registration act took effect. *Id.* at 459. Those offender's risk levels were assessed by probation or parole officers who had received one day of training on conducting risk assessments. *Id.* at 463. Their assessment decisions were reviewed by a member of New York's Board of Examiners of Sex Offenders or its designee. *Id.* The sex offender was notified only after the assessment had been completed. *Id.*

The court applied the *Mathews v. Eldridge* balancing test and concluded that neither track satisfied the Constitution's procedural due process requirements. *Id.* at 468-72. *Pataki* does not conflict with *Weems* with regard to either track. First, New York's judicial procedures for incarcerated sex offenders at the sentencing court bear little, if any, resemblance to Arkansas' judicial procedures. Among other things, Arkansas sex offenders get an opportunity to see the evidence and seek relief in the appellate courts. Furthermore, the Petitioners here challenge Arkansas' procedures during the initial risk assessment, not the judicial review thereof. Thus, the portion of the

court's decision in *Pataki* regarding judicial review procedures does not support the present petition. Second, New York's initial-assessment procedures for sex offenders who were on probation or parole have absolutely no resemblance to Arkansas' initial-assessment procedures. Arkansas notifies sex offenders about the initial assessment, gives them an opportunity to review the evidence, and gives them an opportunity to be heard during a personal interview. New York did not notify them until after the initial assessment had been completed, so they could neither review the evidence nor be heard during an interview with the person conducting the assessment. As a result, the initial-assessment procedures at issue in *Pataki* and *Weems* are so different that there is no conflict between them.

The Oregon risk-assessment procedures at issue in *Nobel v. Board of Parole and Post-Prison Supervision* significantly differ from Arkansas' risk-assessment procedures. The pivotal facts in the Oregon Supreme Court's *Mathews v. Eldridge* analysis were that the risk assessment at issue was subjective and based on confidential information that was not disclosed to the offender. *Id.*, 327 Ore. 485, 497, 964 P.2d, 990, 996 (1998). Moreover, *Noble* contains no suggestion that Oregon's assessment procedures included an interview of the offender. *Id.* Thus, Oregon offenders could not challenge the evidence even if it were not confidential. In contrast to the subjective and secretive nature of Oregon's risk assessments, Arkansas' risk assessments include actuarial analyses, psychological testing and evaluation, a polygraph or penile plethysmograph, and a review of relevant records. Arkansas' assessment procedures allow offenders to obtain copies of those records and dispute them during face-to-face

interviews with an examiner. Given the differences between the Oregon and Arkansas risk-assessment procedures, *Nobel* does not conflict with *Weems*.

In sum, there are considerable factual differences in the risk-assessment systems at issue in *Weems*, *Poritz*, *Pataki*, and *Nobel*. Consequently, the results of the *Mathews v. Eldridge* balancing test in *Poritz*, *Pataki*, and *Nobel* do not support the Petitioners' assertions that the result of the Eighth Circuit's application of that test in *Weems* is incorrect and that the decision in the present case conflicts with the other cited decisions as a matter of law.

B. The question of the appropriate burden of proof during sex-offender risk assessments is not compelling as demonstrated by the fact that the Petitioners did not brief that question in the Eighth Circuit.

Petitioners attempt to raise for the first time in this Court a claim regarding the appropriate burden of proof in sex-offender risk assessments. None of the Petitioners' pleadings in the Eighth Circuit, including their initial brief, reply brief, and Petition for Rehearing and Rehearing En Banc, ever raised such an issue. Thus, it is not surprising that the Eighth Circuit did not decide that question or even discuss it. If the Court were to issue the writ, then the Petitioners would ask it to reverse the Eighth Circuit on a question that the court of appeals never considered. Rule 10 of this Court's Rules makes clear that the Court will issue a writ of certiorari "only for compelling reasons." Sup. Ct. R. 10. Petitioners cannot fairly assert that the question of the appropriate burden of

proof during sex-offender risk assessments is compelling when they never raised that issue in the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DUSTIN MCDANIEL
Attorney General of Arkansas

C. JOSEPH CORDI, JR.
Assistant Attorney General
Counsel of Record

March 2007

SEX OFFENDER GUIDELINES AND PROCEDURES

FOR IMPLEMENTING RISK ASSESSMENT AND COMMUNITY NOTIFICATION REGARDING SEX OFFENDERS

(revised June 2004)

BACKGROUND

On June 19, 1998, the U.S. Department of Justice published Proposed Guidelines in the Federal Register (63 FR 33696) to implement the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act as amended by "Megan's Law," the Pam Lychner Sexual Offender Tracking and Identification Act of 1996, and §115 of the General Provisions of Title I of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998. The Wetterling Act was further modified by the "Campus Sex Crimes Prevention Act" (§1601 of Public Law 106-386). This federal law, enacted October 28th, 2000, provides for the tracking of, and availability of **notification** information, to the campus community about, convicted, registered sex offenders enrolled as students, working or volunteering at institutions of higher education. These requirements are tied to state eligibility for certain types of federal grant funding and must be implemented through state law.

The 81st General Assembly of the State of Arkansas passed HB1061, which became Act 989, "The Sex and Child Offender Registration Act of 1997." This legislation was amended by the 82nd General Assembly of the state of Arkansas passing of House Bill 1963 which became Act 1353 of 1999. Act 1353 was modified by Acts 1740 and 1743 in the 83rd General Assembly. Acts 1740 and 1743 were combined and amended into Act 21 of the 2nd extraordinary session of the 84th General Assembly. Because

the assessment and registration requirements are different for juveniles adjudicated as sex offenders, the law relating to juvenile sex offenders was revised in Act 1265 of 2003. Current code section references are Arkansas Code Annotated §§12-12-901 through 922, and for juveniles §9-27-356. The intent of these various Acts is to protect the people of Arkansas from victimization by individuals who have previously engaged in this type of criminal activity.

The law provides for the appointment by the governor of a Sex Offender Assessment Committee, which includes:

- A defense attorney
- A prosecuting attorney
- Two licensed mental health professionals
- A victim's rights advocate
- A law enforcement officer
- The director of the Arkansas Department of Correction, or the director's designee
- The director of the Arkansas Crime Information Center, or the director's designee
- The director of the Department of Community Correction, or the director's designee
- A member with expertise in juvenile justice or treatment.

The Sex Offender Assessment Committee is charged with promulgating guidelines and procedures for disclosure of relevant and necessary information to the public when the release of the information is necessary for the public protection. Those guidelines include protocols for **risk**

assessment and criteria to assist the courts in determining whether a person convicted of a sexual or violent offense is a **sexually violent predator**. The committee qualifies examiners to perform assessments under this law, and certifies treatment providers.

Maintenance of the Sex Offender Registry and Web Site, and responsibility for tracking of sex offenders in the community is vested in the **Arkansas Crime Information Center (ACIC)**. Contact may be made through the Internet, http://www.acic.org/. The Internet links provide statistical information as well as individual information on high-risk offenders and **sexually violent predators**. Correspondence may be directed to the **Arkansas Crime Information Center**, One Capitol Mall, Little Rock, AR 72201. The phone number for **ACIC** is (501) 682-2222.

The staff who carry out the assessment procedures of the Sex Offender Assessment Committee are employees of the Arkansas Department of Correction. Correspondence to the Sex Offender Assessment Committee and to the staff for Sex Offender Screening and Risk Assessment may be directed to Post Office Box 6209, Pine Bluff AR 71611-6209, faxed to (870)850-8446, or E-mailed to **adc.sosra@arkansas.gov**. Phone contact may be made through (870) 850-8429.

OVERVIEW OF THE REGISTRATION, ASSESSMENT & NOTIFICTATION [sic] PROCESS

1. ***Target Offenses.*** Adults found guilty or found not guilty by reason of mental disease or defect, or who were incarcerated, on parole or probation, or were in the state hospital related to a ***target offense*** on or after August 1, 1997 are required to register and submit to **risk assessment**. (In the case of adjudication in juvenile court, the judge determines whether or not

registration is to be required.) Individuals who are rearrested for a subsequent ***target offense*** must be **reassessed.**

2. ***Arkansas Crime Information Center (ACIC).*** Any offender, adult or juvenile who would be required to register in the jurisdiction in which he or she was adjudicated, who is newly convicted or previously convicted and moving into an area or enrolling, working or volunteering in an institution of higher education or training, is responsible for presenting himself or herself to the Chief Law Enforcement Officer who will see that he or she is registered with, and tracked by, the ***Arkansas Crime Information Center (ACIC).*** (Failure to maintain registration is a Class D felony.) Questions about registration should be directed to **ACIC.**

3. ***Residency.*** Adults and juveniles from outside of Arkansas who have been or would be required to register by the laws of the jurisdiction in which they were adjudicated are required to be assessed and to register if they spend more than 14 consecutive days or more than 30 aggregate days a year ***residing*** in Arkansas or entering Arkansas for employment, education or training.

4. ***Sex Offender Screening Advisement.*** Each individual required to register is provided a ***Sex Offender Screening Advisement*** that details the **risk assessment** process along with the forms notifying him/her of the duty to register. The Department of Community Correction provides advisements to known sex offenders moving into Arkansas, if the offender is under supervision. Law enforcement offices may obtain forms from the ***ACIC*** website, for those individuals who are required to register, but are no longer under supervision.

5. ***Qualifications.*** **Only examiners qualified by the Sex Offender Assessment Committee may do risk assessments.** The Sex Offender Assessment Committee will also develop a list of ***treatment providers*** who meet education, specific sex offender training, and practice guidelines.

6. ***Risk assessment.*** The **assessment** produces an estimate of ***level of risk*** to the community, a report regarding factors that appear to influence the manifestation of inappropriate sexual behavior, and the age(s) and genders(s) of known victims. The staff doing the assessment ask questions about patterns of sexual behavior during the assessment. All information provided in the assessment has use immunity, which means that none of it can be used to prosecute the offender in a future court case or appeal.

7. ***Risk Levels.*** Four ***levels of risk*** are used: Level 1 – Low Risk; Level 2 – Moderate Risk; Level 3 – High Risk; and Level 4 – **Sexually Violent Predator.**

8. ***Overrides and Departures.*** The actuarially based portion of the **risk assessment** is subject to ***overrides*** and ***departures*** related to special circumstances, facts and psychological disorders affecting the **level of risk** posed by an individual. A licensed psychologist or psychiatrist must approve all overrides and departures.

9. The ***Offender Fact Sheet*** and the ***Risk Assessment Report*** are the documents sent to the chief of police, sheriff and prosecutor who have jurisdiction where the offender **resides**, and to **ACIC**, and to the Arkansas State Police. Certified law enforcement authorities, licensing and certification boards and **ACIC** may access **offender fact sheets** through a web site or request database searches for aid in solving crimes.

The offender may request a copy of the ***offender fact sheet.***

10. ***Administrative Review.*** The offender has ten days from the receipt of **notification** or risk level to request ***administrative review*** of his/her **risk assessment**. He or she must present written justification for that review. Reviews are justified on the basis of previously unavailable information or allegations that these guidelines were not followed.

11. ***Judicial review*** of assigned **risk level** may be requested by an offender who does not accept the findings of the ***Administrative Review. Judicial Reviews*** *follow the Administrative Procedures Act as stated in ACA §§25-15-201 et seq.*

12. ***Notification.*** If the offender requests an ***administrative*** or a ***judicial review***, **notification** will proceed at one ***risk level*** below that being questioned until the matter is resolved. The Chief Law Enforcement Officer having jurisdiction is responsible for ***notification*** of the appropriate agencies and citizens according to the **notification** plan. (**Notification** must reoccur as demanded by circumstances.)

13. ***Notification guidelines*** based on ***level of risk*** are provided with each assessment. The Chief Law Enforcement Officer must meet the minimum requirements of **notification**, but may modify optional parts of the plan to fit the needs of the community.

14. ***Reassessment*** of offenders who have been previously classified at **risk levels** one (1) through three (3) may be requested at any time by the court, Post Prison Transfer Board or law enforcement if high risk behaviors are suspected, or every 5 years by the offender.

15. ***Termination of Registration.*** The registration requirement for ***sexually violent predators, recidivists***

and those convicted or found not guilty by reason of mental disease or defect of an ***aggravated sex offense,*** or attempt thereof, is for life and may not be ***terminated.*** The registration requirement for offenders convicted of a **target offense** that does not qualify as an ***aggravated sex offense*** may be **terminated** upon completion of fifteen years of registration by order of the sentencing court, or order of the court in the jurisdiction in which the offender lives, if the offender was sentenced by an authority other than an Arkansas court. Additional flexibility is allowed for ***termination*** of the registration requirement for juveniles.

16. ***Aggravated sex offenses*** are those offenses that involve engaging or attempting to engage in a sexual act with a person younger than 12 years of age, or by causing a person of any age to engage in a sexual act by force or threat of serious violence, or by engaging or attempting to engage in sexual activity with a person after rendering that person unconscious or unable to appraise or control conduct. The sentencing court must indicate on the judgment and commitment order or judgment and disposition form whether the offense qualifies as an ***aggravated sex offense (U.S.C. Title 18, Section 2241).***

17. ***Sexually Violent Offense:*** Any *actual or attempted* rape or rape-like offense – i.e., non-consensual sexual assault crimes involving penetration – regardless of the age of the victim, or acts with intent to engage in sexual activity with a child under twelve years of age This includes **aggravated sex offenses** (18 USC 2241) and sexual abuse as defined in (18 USC 2242).

18. ***Sexually Violent Predator. Sexually Violent Predator*** means a person who has been adjudicated guilty, or acquitted on the grounds of mental disease or defect of a ***sexually violent offense,*** *or is*

convicted of second or subsequent sexual offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in future predatory ***sexually violent offenses.***

19. ***Records.*** Records of assessments will be maintained on electronic media indefinitely. These records are not subject to the Freedom of Information Act, but some parts may be released to the offender or his/her attorney under certain circumstances

20. ***Research:*** Continuous efforts will be made to better understand and assess the risks associated with sex offending through ***research.***

21. Individuals carrying out the tasks prescribed by law and these regulations are provided ***immunity*** for their good-faith actions under the law.

TARGET OFFENSES (Section 1)

Generally **target offenses** include (42 U.S.C. 14071 a, (3) A and B):

- Kidnapping of a minor, except by a parent;
- False imprisonment of a minor, except by a parent;
- Criminal sexual conduct toward a minor;
- Solicitation of a minor to engage in sexual conduct;
- Use of a minor in a sexual performance;
- Solicitation of a minor to practice prostitution;
- Any conduct that by its nature is a sexual offense against a minor;
- Any **sexually violent offense** regardless of the age of the victim (18 U.S.C. Sections 2241 and 2242);

- An attempt to commit any of the above offenses if the legislature chooses to make such an attempt a criminal offense requiring registration;
- Exceptions to the above may be made if the act is criminal based on the age of the victim and the perpetrator is 18 years of age or younger;
- Any other offense that the Arkansas Legislature chooses to include as a sexual offense or violent offense against a child.

Some offenses such as "stalking" may not have sexually motivated component. In such cases the Court will determine whether or not the individual should be required to register.

1. Kidnapping of a minor, not by a parent §5-11-102
2. False imprisonment 1st not by a parent §5-11-103
3. False imprisonment 2nd degree, not by a parent §5-11-104
4. Permanent detention or restraint of a minor, not by a parent §5-11-106
5. Rape §5-14-103
6. Sexual indecency with a child §5-14-110
7. Public Sexual Indecency §5-14-111
8. Indecent exposure, if a felony offense §5-14-112
9. Exposing another person to HIV, when ordered by the Court to Register §5-14-123
10. Sexual Assault 1st degree §5-14-124
11. Sexual Assault 2nd degree §5-14-125

12. Sexual Assault 3rd degree §5-14-126

13. Sexual Assault 4th degree §5-14-127

14. Incest §5-26-202

15. Permitting abuse of a child §5-27-221

16. Engaging children in sexually explicit Conduct for use in visual or print medium §5-27-303

17. Pandering or possessing visual or print medium depicting sexually explicit conduct involving a child, §5-27-304

18. Transportation of minors for prohibited sexual conduct §5-27-305

19. Employing or consenting to the use of a child in a sexual performance §5-27-402

20. Producing, directing or promoting a sexual performance §5-27-403

21. Distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child §5-27-602

22. Computer child pornography §5-27-603

23. Computer exploitation of a child §5-27-605

24. Promoting prostitution in the first degree §5-70-104

25. Stalking when ordered by the court to register §5-71-229

26. False attempt, solicitation, or conspiracy to commit any of the above offenses.

This list of target offenses is not exclusive. The registration requirement extends to the requirements of other

states, and similar juvenile, tribal, military or other federal offenses. Newly enacted sex offenses or current **target offenses** subsequently modified by legislation will be considered **target offenses** unless otherwise specified by the legislature. The sentencing court has the authority to order the registration of any offender shown in court to have attempted to commit or to have committed a sex offense, even though the offense is not listed as a **target offense**. Any individual, living in or moving into Arkansas, or regularly entering Arkansas for employment, education or training, who has been convicted of a **target offense** or a differently titled, but equivalent offense by a federal court, tribal court, military court, or the court of another state, that is the substantial equivalent of a **target offense**, is required to register, and to submit to **risk assessment**.

ARKANSAS CRIME INFORMATION CENTER (ACIC) (Section 2)

The **Arkansas Crime Information Center (ACIC)** is the agency responsible for tracking all sex offenders who are required to register.

From the point of initial registration, the offender must notify ACIC in writing of any change in residence address *not later than 10 days prior* to leaving the address of the offender's current registration. Some latitude is allowed for emergency change of address as in the case of a dwelling fire or natural disaster.

Offenders are required to return a verification of **residence** address every 6 months (every three months for an offender adjudicated as a **Sexually Violent Predator**). *This verification is required even if there has been no*

change of address. The six-month period begins with first registration. Individuals who are incarcerated or housed in a state institution that does not allow them into the community are not required to verify their address until ten days prior to their release or a change of status that allows them access to the community. Law enforcement is encouraged to check that the offender actually **resides** at the address given.

An offender who fails to register or to report changes of address as required, may be charged with a Class D felony, and if found guilty may be sentenced to up to six years and fined up to $10,000. Any offender meeting ACIC criteria of "delinquent" or "address unknown" will have his/her Offender Fact Sheet placed on the public section of the web page until registration requirements have been met.

Sex Offender Registration Form

Reporting this information is required by ACA §12-12-904. This form shall be sent to the Arkansas Crime Information Center within 3 days after completion for entry into the state and national Sex Offender Registration Files.

Type or Print Black Ink Only | Sentencing Court | Registered as: Sex or Child Offender ☐ (Check Box) Sexually Violent Predator ☐

Offender's Last Name	First Name	Middle Name	AKA or Alias Last Name	First Name	Middle Name

Date of Birth	Race	Sex	Height Ft In	Weight	Hair Color	Eye Color	Social Security #

State Ident # (Arkansas SID)	F B I # (if available)	Driver License #	ID Card #	State of DL or ID Card

Scars/Marks/Tattoos

Sex or Child Offense Information (If additional space is needed, list on separate sheet and attach to this form)

Date of Arrest	Arresting Agency	Offense for which found guilty or acquitted by reason	Arrest Tracking #
Date of Arrest	Arresting Agency	Offense for which found guilty or acquitted by reason	Arrest Tracking #
Date of Arrest	Arresting Agency	Offense for which found guilty or acquitted by reason	Arrest Tracking #

Institute of Higher Education (known or anticipated) **(If currently attending/volunteering/ employed, check here** ☐

Name of Institute	Location

Residence Address (known or anticipated) **Mailing Address** (if different from residence, for example P.O.Box)

Street #, Street Name; RR # & Box; Apt #; Mobile Home # (Do not use P.O. Box here)					Street #, Street Name; RR # & Box; Apt #; Mobile Home # or P.O. Box #		
City	**County**	**State**	**Zip**	**Phone #**	**City**	**State**	**Zip**

Place of Employment **Address of Employment**

Name of Employer (company and/or individual)	Street # Street Name/ RR# & Box	City	State	Zip	Phone #

Brief Description of the Crime(s) for which this registration is required

Victim Information	Age Victim 1	Race Victim 1	Sex Victim 1	Offender Relationship to Victim 1	Age Victim 2	Race Victim 2	Sex Victim 2	Offender Relationship to Victim 2

If Assessed Indicate: Assessment Level _____ **Date Assessed**_____ **Assessed by:**_____

Acknowledgement by Offender

I hereby acknowledge that I have been advised of my duty to register as a sex or child offender, or sexually violent predator, as required by Arkansas ACA §12-12-904. I have also been advised that failure to regularly verify my address or failure to report any change of address as required under ACA §12-12-904 constitutes a Class D felony and may result in my subsequent arrest and prosecution.

Registering Agency or Court	Changes Registration? YES NO (circle one)
Address	City and Zip
Name (Printed) of official completing this form	Area Code & Phone #

_____
Signature of Offender

_____
Date

This Form shall be sent to the **Arkansas Crime Information Center, One Capitol Mall, Little Rock, AR 72201.** Failure to complete and forward this form to ACIC within 3 days after registering an offender is a Class B Misdemeanor under ACA § 12-12-904. (ACIC SOR Form 07-25-02)

13a

Arkansas Crime Information Center

State Sex Offender Registry

Change of Address Form for Registered Sex Offenders

Please complete the following information and mail or fax to the Arkansas Crime Information Center within five days of receipt of this form in order for your record to be promptly updated.

Form Completed by: _____ **Date Form Completed:**_____
(If other than the offender)
Jurisdictional Agency Name (If Applicable)_____

Offender Name:_____ **Race:** _____ **Sex:** _____

Date of Birth: _____ Social Security No:_____

Previous Address:

_____
Street or Rural Route No. & Box

_____
City_____ State____Zip_____

Institute of Higher Education:

_____
Name of Institution

If Currently Attending Check Here: ☐

Place Of Employment:

_____
Name of Employer (company or individual)
If unemployed, state unemployed.

Address Of Employer:
Street or Rural Route No. & Box

_____
City State Zip

*Telephone No.( )*_____

New Mailing Address: (May use PO Box if not your residence)

_____
Street or Rural Route No. & Box

_____
City_____ State____Zip_____

Telephone No. ( )_____

Date Moved or Planning to Move _____

New Place of Residence: if different from new mailing address: (Do not use PO box for residence!)

_____
Street or Rural Route No. & box
City State Zip_____

If new place of residence has been physically verified, sign below

_____ | _____
Law enforcement official only *Date verified*

Signature of Offender: _____ **Date Signed:** _____
(Required)

Failure to report any change of address as required by Act 989 of 1997 as amended constitutes a Class D Felony and may result in subsequent arrest and prosecution.

Arkansas Crime Information Center ? One Capitol Mall ? Little Rock, AR 72201?(501) 682-2222 FAX:(501) 682-2269
Rev. 08/09/02

ACIC can release information regarding individual offenders only to members of the criminal justice system. However, if a member of the public believes that a sex offender should have registered, but did not, or has changed address or employment without proper **notification**, information may be given to ***ACIC*** by calling (501) 682-2222 or sending an E-mail to pstitz@acic.state.ar.us. While ***ACIC*** cannot release information on the individual except to law enforcement, all information from the public will be checked out.

ACIC operates two web sites. One is accessible to law enforcement only and contains detailed information on all registered sex offenders. The other is accessible to the general public and provides information on Level 3 (high risk) and Level 4 (**Sexually violent predators**).

Should questions arise about the registration process, **ACIC** maintains a web site, http://www.acic.org/.

RESIDENCY (Section 3)

Residence in a jurisdiction is not limited to dwelling full time in that jurisdiction. For purposes of registration, for example, a sex offender with a legal residence in downtown Clarksville in Johnson County may attend the University of Arkansas and reside during the week in a house in Washington County, returning to Johnson County for weekends and holidays. For purposes of registration that individual should register with the Chief of Police of Clarksville, as well as Campus Safety at the University of Arkansas, and with the Sheriff of Washington County. Similarly a resident of West Memphis who works in Memphis must register with both the West Memphis (Arkansas) and the Memphis (Tennessee) authorities.

Residence is defined temporally by whether the individual spends 14 consecutive days or more in a location (e.g. a three week vacation at Lake Hamilton should result in notification of Garland County authorities), or an aggregate of more than 30 days a year, (e.g. a salesman with a weekly sales route through several counties).

Any change of status (new job, becoming or ceasing to be a student, etc. must be brought to the immediate attention of **ACIC**.

Any offender moving to, or returning to, Arkansas is required to register with local law enforcement within 30 days of establishing residency. Offenders moving into Arkansas, who have been, or would be, required to register in the jurisdiction in which they were sentenced, are also required to undergo **reassessment**, submit a DNA sample, and pay $250 to the DNA detection Fund established under §§ 12-12-1101 & 1102.

Any offender moving into or out of the state must inform **ACIC** at least ten days prior to the move, and must register with the appropriate law enforcement agency in the new state.

SEX OFFENDER SCREENING ADVISEMENT (Section 4)

Upon receipt of the Judgment and Disposition the Department of Community Correction provides the offender who is being released to community supervision copies of the **ACIC** Sex Offender Registration Form and the document **"Sex Offender Screening Advisement."** This document is intended to inform the offender of the

requirements and procedures for **risk assessment**, and the limits on confidentiality. Having read the document, the offender indicates his/her willingness or refusal to undergo **risk assessment**. *Should the offender refuse **risk assessment**, he/she is classified at the "high" **level of risk**.* DCC then mails a copy of the signed document to SOSRA. P.O. Box 6209, Pine Bluff, AR 71611-6209.

Offenders who are sentenced to the Arkansas Department of Correction will be given the advisement and complete the **ACIC** Sex Offender Registration Form at the point of intake, or as soon as possible thereafter.

Individuals found Not Guilty by Reason of mental disease or defect will complete the **ACIC** Sex Offender Registration Form at the State Hospital and be given the **Sex Offender Screening Advisement**. The evaluation interview and testing will usually be conducted at the State Hospital when, in the opinion of ASH clinical staff, the mental status of the individual allows.

The "**Sex Offender Screening Advisement**" document is available from the **ACIC** web site for any law enforcement agency registering an individual from another state who meets the registration requirements for Arkansas but is not under supervision of the Arkansas Department of Correction or the Arkansas Department of Community Correction.

To prevent gaps, SOSRA will request the **ACIC** to provide a monthly listing of **target offense** convictions.

SEX OFFENDER SCREENING
AND RISK ASSESSMENT
CONSENT/REFUSAL/DISCLOSURE FORM

As an individual convicted of a sex offense or an offense against a child, you are required to by law to submit to an assessment to determine the level of risk that you pose to the general public. A team operating under the oversight of the Sex Offender Assessment Committee will conduct this assessment. The assessment procedures involve: A) a thorough review of official records pertaining to your sexual offense(s) and other criminal history, B) psychological tests as deemed necessary, C) a face-to-face interview, and D) any other methods the team deems necessary to accurately assess your risk, including but not limited to a polygraph examination. You will be photographed, may be video or audio taped, and may be asked to provide a DNA sample (four drops of blood from a finger) and be fingerprinted if necessary. The assessment is based primarily on documented information as opposed to the opinions of your examiner. The information gathered from you may also be used in research projects. This information cannot be used in the sentencing portion of your trial. Statements you make with respect to prior conduct during the course of your assessment may not be used against you in any criminal case except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order granting immunity.

You may refuse this assessment. If you refuse the assessment you will be assigned a Level 3, "HIGH risk" (or possibly greater). If you consent to this assessment but withhold information, give false information or seriously compromise the assessment team's ability to do a fair and accurate assessment on you, you will be assigned a Level

3, "HIGH" risk" (or greater). The chief law enforcement officer where you live will notify those persons who have a need to know of your **risk level**. Any refusal or non-compliance will be made known to the sentencing court and supervising authorities.

An **Offender Fact Sheet** summarizing the results of the assessment will be available to the sentencing court, the Post Prison Transfer Broad [sic] if you are incarcerated, the Department of Community Correction if you are under parole or probation supervision, and the chief law enforcement officer of your jurisdiction for purposes of supervision, and to you. Beyond that, the Sex Offender Screening & Risk Assessment Program will make every effort to keep the information confidential, with the exception of information indicating that any identifiable individual is presently at risk of violent or sexual assault by you.

Authority for sex offender risk assessment and community notification is found in Ark. Code Ann. §§12-12-901 and following sections. Assessment guidelines and procedures are issued under the authority of the Arkansas Administrative Procedures Act, which provides for administrative review of agency rules and decisions. *See* Ark. Code Ann. §§25-15-201 and following sections.

Please read the following disclosure statement carefully, print your name and then initial one of the boxes below.

I, _____, understand that the Sex Offender Screening and Risk Assessment Program will be providing a risk rating to the **Arkansas Crime Information Center**. I also understand that all information provided to the Sex Offender Screening and Risk Assessment

Program is subject to disclosure to those authorized by law to receive it.

I have read and understand the terms and conditions of the assessment outlined above.

[ ] I agree to comply with the assessment. [ ] I refuse to be assessed.

Signed_____ Date:_____/_____/_____

Witness_____ Date:_____/_____/_____.

QUALIFICATION OF EXAMINERS (Section 5)

Risk assessments of adult offenders are currently done through the Arkansas Department of Correction. The Family Treatment Program, through Children's Hospital and the University of Arkansas for Medical Sciences does assessments of juvenile offenders according to standards and procedures developed by that organization and approved by the Sex Offender Assessment Committee.

The assessment team will be required to be qualified by the Sex Offender Assessment Committee. **Qualifications** will be renewed annually at the January organizational meeting.

RISK ASSESSMENT (Section 6)

Assessment of adult male offender risk will be based on actuarial analysis, information obtained from interview, psychological testing and evaluation, review of relevant records and historical data, and polygraph or penile plethysmograph, if deemed necessary by the team conducting the evaluation.

Proven actuarial instruments are not as well standardized for adult female offenders. Therefore, assessments of female offenders may depend more on other methods such as risk factors deduced through history review and interview, voice stress analysis and polygraph.

Different techniques are also used with juveniles and will be those chosen by the Family Treatment Program in consultation with the Sex Offender Assessment Committee.

These procedures will screen for antisocial, psychopathic or other problematic personality characteristics, criminal thinking patterns, mental abnormalities affecting impulse control, sexual deviancies, paraphilias, preoccupation or compulsions, history of violence and other factors that may affect the **level of risk** the offender poses to the community or have a bearing on treatment or supervision plans.

Risk assessment of adults who have been previously convicted and assessed by law enforcement will be considered valid for purposes of registration and **notification**. **Risk assessments** done by other agencies will only be considered if they were recorded by **ACIC**.

All letters concerning scheduling will be sent certified, restricted delivery mail to the last verified address available to **ACIC**. **ACIC** will be notified of any letters returned as undeliverable. The offender will be considered non-compliant if a response is not received within 14 days of the date of receipt of the communication as indicated on U.S. Postal Service documentation. The Department of Community Correction and/or local law enforcement will be asked by **ACIC** for assistance in locating the offender.

Any individual not presenting him or herself for assessment will be considered non-compliant and classified at **risk Level** 3 until the **risk assessment** is completed. If arrangements for assessment are not made within 5 days of a missed appointment, the individual will remain Level 3 pending the next five-year assessment or a request for assessment from the court or chief law enforcement officer. This provision may be waived by vote of the Sex Offender Assessment Committee upon presentation of documentation that the offender was unable to comply due to hospitalization, incarceration, natural disaster, or the like. The chief law enforcement officer having jurisdiction, the sentencing court, and the Department of Community Correction will be notified of any instances of non-compliance.

Sex offenders newly convicted as adults will be referred to the offices of Sex Offender Screening and Risk Assessment in Pine Bluff. Juvenile offenders will be referred to the Family Treatment Program at Children's Hospital. Offenders sentenced to the Arkansas Department of Correction will be assessed as resources are available to complete these assessments. Incarcerated offenders may be **reassessed** as needed during the course of their incarceration, with the **risk assessment** being given final review at the point of release. Any offender placed on probation will be given a form advising him/her of the requirements and the process for setting up an appointment.

The assessment process consists of an intensive interview regarding patterns of behavior and life incidents that are relevant to actuarial and clinical assessment. The questions are direct and often deal with areas that people are not comfortable talking about. Prior to the interview, documents have been requested from law enforcement,

prosecutors, treatment programs, and any other sources that have relevant information. It is important that the person being interviewed answer the questions openly and honestly. If the answers do not match up with the documents previously obtained, the interviewer may conclude that the individual is withholding information or being deceptive. Non-compliance in an interview may lead to a higher risk level determination than the individual would receive if he or she were being open and honest. The reason for this is that the Sex Offender Assessment Committee believes that if the individual who is being deceptive about his/her sexual behavior and not accepting responsibility for it, poses a greater risk to the community.

At the same time, law protects any admissions made by the individual during the interview. They have "use immunity" which means that they cannot be used against the individual in a court of law. Thus the individual does not need to fear incriminating him or herself by revealing behaviors that have not been previously charged, or are related to cases that are under appeal. In this way the individual's fifth amendment rights are protected.

LEVEL OF RISK FOR ADULT AND JUVENILE OFFENDERS (Section 7)

Based on historical data and information obtained from the **risk assessment** process, offenders are assigned to the following **levels of risk** to the general public:

1. **Low risk**: Usually these are individuals with no prior history of sexual acting out, and no strong antisocial tendencies, sexual compulsions or psychological factors impairing judgment.

2. **Moderate risk:** Usually these are individuals with limited or circumscribed prior history of sexual acting out, possess some antisocial personality characteristics, predatory tendencies, or deviant sexual interest or behavioral patterns that increase the general **level of risk** these offenders pose. They may have mild or well-controlled mental disorders, and/or developmental disabilities.

3. **High risk:** These individuals usually have histories of repeat sexual offending, and/or strong antisocial, violent or predatory personality characteristics. Sexual compulsions are likely to be present, but may be kept under control when relapse prevention plans are followed and treatment is continued. The offense patterns of these individuals reflect a relatively high probability of re-offense and/or a risk of substantial injury to victims should re-offense occur.

4. **Sexually Violent Predator**: These are individuals with impaired judgment or control who have sexual or violent compulsions that they lack the ability to control. This may be due to pedophilia or other disorder of sexual attraction, mental illness or personality disorder that distorts thinking, interferes with behavioral control, and predisposes the person to acts of predatory sexual violence.

Individuals who refuse assessment will be classified as being "high risk." Individuals who attempt to conceal or lie about their behavioral histories will similarly be classified "high risk." The court may make the determination that an individual is a **Sexually Violent Predator** even if a valid assessment cannot be produced due to refusal to cooperate or apparent efforts to deceive the examiner.

OVERRIDES AND DEPARTURES (Section 8)

Some flexibility is required in the **risk assessment** procedure to take into account special circumstances of a particular case that either are not sufficiently considered, or require more emphasis than afforded, in the actuarial prediction model. The following **overrides** and **departures** represent the primary (but not exclusive) causes to modify the actuarial risk assessment. They are used sparingly and only with the approval of senior clinical staff, and may differ for juveniles. Only the court may assign Level 4, **Sexually Violent Predator**.

Overrides

1. If the offender has committed previous juvenile or adult sexual offense(s), or has multiple current offenses (involving different victims, times, and/or circumstances), he/she should be deemed to pose the highest **level of risk**. This may extend to known or self-admitted molestations, offense [sic] that were reported and reliably investigated even if not prosecuted, and offenses primarily sexual in nature but pleaded down to non-sexual offenses.

2. If statements made by the offender during the interview, or certain features of the psychological assessment, or the judgment of clinical staff, or relevant historical data suggest higher risk than the actuarial model predicts, the offender may be assigned to a higher **risk level**.

3. If the offense involved extreme physical injury, death, or other heinous actions, the

offender should be assigned to the highest **level of risk**.

4. If the offender has provided information on record or during the interview that he/she is likely to commit subsequent **sexually violent offenses**, he/she should be assigned to the highest **level of risk**.

5. If the offender is deemed to have provided deliberately false or misleading information to the assessment team, or provides answers on a standardized test that meet the criteria for invalidity his/her **level of risk** may be increased.

6. If the offender refuses to submit to, or seriously compromises, the interview and assessment process, his/her level may be raised to the high **risk level**, and or the offender may be considered by the Sex Offender Assessment Committee for a recommendation to the court for consideration as a **sexually violent predator**.

If the clinical team determines that the offender suffers from a mental abnormality, physical condition, addiction or other psychological impairment that decreases his/her ability to control sexual impulses, or increases his/her potential for sexual violence, his/her **risk level** may be increased.

Departures

1. If treatment, behavioral, anti-androgen or other, is believed to significantly enhance the offender's impulse control ability and to decrease the predisposition to reoffend, and

the professional providing treatment indicates a willingness to work with Sex Offender Screening and Risk Assessment, the offender may be assigned to a lower **risk level**, unless the offender has been classified at Level 4, **Sexually Violent Predator**. Should the offender withdraw from treatment against the advice of the therapist, or become more predisposed to reoffend in the view of the therapist, the therapist will notify Sex Offender Screening and Risk Assessment. The offender will revert to his/her previous **risk level** and law enforcement will be notified.

2. If there are aspects to the offense pattern that suggest that the sexual acting out was a temporary aberration unlikely to recur, or the nature and pattern of the offense is such that it poses less of a risk to the community at large, his/her **risk level** may be decreased.

3. If the offender's current **risk assessment** data is at such variance with aspects of the official record (E.g. the alleged victim recanted, or the spouse admitted that the allegations were confabulated out of spite), his/her **risk level** may be decreased.

4. Adolescent offenders in a residential treatment program, group home, therapeutic foster care, foster care, or other appropriately supervised placement may be assigned to a lower **level of risk**. The adolescent will revert to his/her higher **level of risk**, should he/she stop treatment or become noncompliant with the supervision and/or safety plan.

Any **departure** or **override** will be fully documented and is subject to review by the Sex Offender Assessment Committee.

OFFENDER FACT SHEET (Section 9)

The results of the assessment are summarized as an **"Offender Fact Sheet."**

The **"Offender Fact Sheet"** will be completed on a web-based application maintained by **Arkansas Crime Information Center (ACIC). ACIC**, Law Enforcement Agencies, the Department of Community Correction, the Post Prison Transfer Board and social service agencies may be provided a password to allow complete access to the database. This password will be changed regularly, and the Internet address of all individuals accessing the database will be tracked. The chief law enforcement officer having primary jurisdiction over the campus of an institution for training or educations shall have access to the web-based application file of the fact sheets on all registered sex offenders maintained by the **Arkansas Crime Information Center.**

The database may be queried by *modus operandi*, weapon, victim age and gender, area of the state, physical description, description of the subject vehicle, and such other information likely to aid in ongoing investigations. Certain information such as Social Security Number, Driver's License Number, and information about employers or victims that is available to law enforcement, may not be available to the public.

Any one determined to be an appropriate party to receive **notification** may view the **Offender Fact Sheet**, with

certain information (such as Social Security number) deleted, at the discretion of law enforcement. Any individual receiving **notification** should be advised against publishing or sharing the **notification** beyond the individuals, families or agencies specified in the **notification** plan. Any individual notified should be advised that harassment of sex offenders is against the law.

The **offender fact sheet** will include:

- Offender's full name and known aliases
- Date of birth
- Physical description
- Hair and eye color
- Scars, marks or tattoos
- Address of temporary **residence**
- Anticipated address of legal **residence**
- Driver's License Number or State Identification Number
- Social Security Number
- Place of employment
- Photograph
- Fingerprint Code (if available)
- State Police Identifying Number (SID) (if available)
- Criminal history
- Brief description of crime for which registration was required
- *Modus operandi* and/or weapons used in committing sex offenses

- **Risk level**
- Factors likely to influence **risk level**
- Date of DNA sample
- Victim preferences
- Treatment history and recommendations

Copies of the **Offender Fact Sheet** are made available by the Arkansas Department of Correction to:

- The **Arkansas Crime Information Center (ACIC);**
- The sheriff and/or chief of police of the city and/or county in which the offender resides;
- Parole or probation (if the offender is under Department of Community Correction supervision or Juvenile Probation);
- The Post Prison Transfer Board (if the offender is currently incarcerated);
- Any therapeutic program in which the offender is enrolled;
- The offender;
- Any law enforcement agency requesting the **Offender Fact Sheet;**
- Any court in which the offender is a party to the proceedings;
- The chief law enforcement officer having primary jurisdiction over the campus of an institution for training or education, in those cases in which Sex Offender Screening and Risk Assessment is made aware that the offender is a student, part or full-time employee, or volunteer on a campus covered by this act.

The Chief Law Enforcement Officer **must** make the **Offender Fact Sheet** available to the victim and members of the community indicated in the **Notification** Guidelines. An abbreviated version of the **Offender Fact Sheet** will be available off the Internet for this purpose.

The following is a cover letter suggested as a model to be provided with any **Offender Fact Sheet**:

> The [*insert name of the law enforcement agency*] is releasing the attached information pursuant to Act 989 of 1997 as amended, and guidelines provided by the Sex Offender Assessment Committee established by that law.
>
> The individual who appears on the attached Fact Sheet has been convicted of an offense that requires registration with the **Arkansas Crime Information Center**. This individual is not wanted by law enforcement at this time. No action on your part is required other than the type of alertness and caution that increases the safety of individuals, families, neighborhoods and communities. Should you observe suspicious behavior on the part of this individual, do not take action on your own, but immediately notify law enforcement. You may not share this information with others, except those who have a need to know (other adult members of your family, if this is a family **notification**; coworkers in a position to prevent harm, if this is an agency **notification**).
>
> This **notification** is not intended to cause alarm. Nor may you use this information to intimidate or harass the person identified. Harassment of any individual is against the law. We are all better protected if this individual makes a

successful adjustment and maintains control over deviant sexual impulses.

If you feel you need further information about the dynamics of sex offending, you may contact the Arkansas Commission on Child Abuse, Rape and Domestic Violence, 4301 W. Markham, Slot 606, Little Rock, AR 72205. Phone contact may be made through (501) 661-7975.

ADMINISTRATIVE REVIEW (Section 10)

The Sex Offender Assessment Committee shall appoint (a) member(s) to do **administrative reviews** of **risk assessments**. The duty of the **administrative reviewer** shall be to ensure that these guidelines and procedures have been followed in a thorough and objective manner, and that any documents or official records not available at the time of the **risk assessment** are brought to the attention of the assessment team who will determine whether the information has a bearing on public risk.

Each adult offender will be notified of his/her **level of risk**, and the **notification** guidelines accompanying it. **Notification** will be by registered mail to the address provided to the **Arkansas Crime Information Center** for purposes of registration. He or she will have fifteen (15) days from the date of receipt to send written justification for an **administrative review** to Sex Offender Screening and Risk Assessment, P. O Box 6209, Pine Bluff, AR 71611-6209. If needed evidence is not in the possession of the offender, he/she should identify the agency holding the evidence, and request an extension of time, not to exceed an additional fifteen (15) days.

The offender may initiate an **administrative review** on either or both of the following bases:

1. The offender has, or can direct Sex Offender Screening and Risk Assessment (SOSRA) to, documents that were unavailable to SOSRA at the time of assessment and are related to the actuarial method used in the determination of **level of risk**. Unsupported allegations made by the offender will not be considered.

2. The offender alleges that the regulations listed herein were not followed or followed in a manner inconsistent with the spirit of the Sex Offender Registration Act. The offender must show probable error, prejudice or negligence committed by an individual or individuals involved in the **risk assessment**.

Requests for an **administrative review** based on a dislike of the **level of risk** assigned to the offender, the unfairness of the system, or legal questions related to the original adjudication and sentencing will not be considered. The **administrative review** is based on document and record review only, the offender has no right to appear or call witnesses.

A juvenile offender may request **administrative review** of his/her assessment only if he/she is required by the juvenile court to register. At that time he/she will be advised of his/her rights to request the **administrative review** procedure shown below.

The Secretary of the Sex Offender Assessment Committee will conduct reviews. Should the Secretary feel that a change in **level of risk** is warranted, the recommendation will be taken up by the full committee. The offender will be notified of the results of the review, except in the case of

random quality improvement reviews. Copies of the Secretary's response will be sent to the offender, the chief law enforcement officer of the city and/or county in which the offender **resides**, **ACIC**, and the Sex Offender Assessment Committee. Any member of the Sex Offender Assessment Committee may ask to see source documents or question the **administrative reviewer** regarding the reasoning behind the recommendation.

The decision of the **administrative reviewer** will exhaust administrative remedies available to the offender. If the offender wishes to pursue the matter further, he or she may file for a **Judicial Review**. Pending the outcome of administrative or **judicial reviews**, **notification** will be restricted to that required for one level below the level being reviewed.

JUDICIAL REVIEW (Section 11)

Upon receipt of the findings of the ***administrative review***, the offender has thirty (30) days to file a petition under the Arkansas Administrative Procedures act in Pulaski County Circuit Court or in the Circuit Court of the county in which the offender **resides**, requesting **judicial review** of the **risk level**. The Court will accept the request for a review only if the offender demonstrates that administrative remedies have been exhausted.

When served notice by the Court that the offender has exhausted his/her administrative remedies and the appeal for review has been accepted by the Court, the Sex Offender Assessment Committee will, within thirty days, provide the Court with copies of all records in its possession. The Committee may ask the court to seal statements

of victims, medical records, and such items that could place third parties at risk of harm.

A ruling by the Court on a petition for **Judicial Review** shall be considered final, and **Offender Fact Sheets** reflecting that level shall be issued to law enforcement, and **notification** at the level approved by the Court shall commence.

NOTIFICATION PROCEDURES (Section 12)

The **Offender Fact Sheet** will be sent to law enforcement to begin **notification** about twenty working days after the receipt of the **Offender Fact Sheet** by the offender, unless a request for an **administrative review** has been received. If an **administrative review** is requested, the **Offender Fact Sheet** will not be sent to law enforcement, and notification shall not commence. If the Sex Offender Assessment Committee determines that a Level three (3) or Level four (4) offender poses a particular danger to the community, an **Offender Fact Sheet** reflecting a **risk level** one step below the level being reviewed may be sent to law enforcement.

If the **administrative review** results in no changes to the **Offender Fact Sheet**, the offender will be advised of his/her right to a **judicial review**. If the offender files for a **judicial review**, the **offender fact sheet** will be sent to law enforcement and community **notification** will commence at one level below that being reviewed, unless this has already been done.

All parties to whom the **Offender Fact Sheet** is sent will be notified of the outcome of the **judicial review**, and will

be instructed to commence (continue) **notification** at the approved level.

The law enforcement officer having jurisdiction over an offender shall review the **notification** guidelines and procedures, and the **offender fact sheet**. Prior to **notification**, the law enforcement agency should visit the listed address to ensure that the subject of the **notification** is, in fact, **residing** or about to reside there. **Any discrepancies on the Offender Fact Sheet should be immediately brought to the attention of Sex Offender Screening and Risk Assessment (Phone (870) 850-8429 or FAX: (870) 850-8446).**

The sheriff or chief of police has the authority to go beyond **notification** guidelines in consultation with multidisciplinary teams, the prosecuting attorney, parole and probation officers, social service agencies, and any other agency or individual who has direct involvement in protecting the community from sex crimes. Any step beyond the **notification** guidelines should have a strong rationale behind it. That rationale should be clearly stated in the **notification** plan.

Notification regarding juvenile offenders will only occur if ordered by the juvenile court.

Should the individual relocate to a new address outside the area covered by the previous **notification** but remain within the jurisdiction of the Chief Law Enforcement Officer, the **notification** plan should be modified, and **notifications** reissued 10 days prior to the move, or as soon as possible following the move. Should the offender move outside the jurisdiction, it is the responsibility of the offender to notify **ACIC** prior to the move. **ACIC** will notify the sheriff and chief of police of the new jurisdiction.

The Chief Law Enforcement Officer must follow the guidelines, but may with good reason, add to or expand **notification** to accommodate circumstances, and is responsible for all community **notification**. For example, community **notification** of the presence of a high-risk rapist who targets adult women would not necessarily follow the same pattern as **notification** regarding a pedophile that targets preadolescent boys.

The Chief Law Enforcement Officer is encouraged to consult multidisciplinary teams, the prosecuting attorney, parole and probation officers, treatment providers, other law enforcement agencies, and any other community resources in preparing the **notification** plan. The plan should be a specific written document showing:

1. Who in the community is to be notified
2. Who participated in the preparation of the plan
3. The approval of the Chief Law Enforcement Officer, or designee
4. The date the plan was made, and dates of **notification**.

A copy of the **notification** plan should be mailed to Sex Offender Screening and Risk Assessment (SOSRA).

Only the Chief Law Enforcement Officer, or designee, is permitted to perform notifications regarding sex offenders to members of the community. Any inquiries from the public will be directed to the Chief Law Enforcement Officer. If feasible, the Chief Law Enforcement Officer will be advised to expect the inquiry. The Sex Offender Assessment Committee retains the authority to respond to questions

from court and law enforcement, departments of correction, parole and probation, and registration authorities in other states.

NOTIFICATION GUIDELINES (Section 13)

The **notification** guidelines indicate which segments of the community must be notified. **Notification given to any individual or agency does not authorize that individual or agency to disseminate information beyond those residing with the individual, or those who have a need to know within the agency.**

Generally, the higher the **risk** level assigned, the broader the **notification** that **must** be given. These **notification** guidelines apply to adult offenders and to juvenile offenders ordered by the court to register. The guidelines should be interpreted narrowly in the case of a juvenile in accordance with the level of confidentiality afforded by the juvenile justice system. **It is the responsibility of the Chief Law Enforcement Officer to interpret these guidelines and prepare a notification plan.** Should circumstances change that may increase the offender's risk to the community, it is the responsibility of the Chief Law Enforcement Officer to modify the existing **notification** plan or request a **reassessment**.

Discretion must be used in applying the guidelines to any offender. The harm that may be caused by a particular **notification** must be weighed against the protection that would be afforded the public. For example, notifying the neighbors about a Level 1 or Level 2 incest offender may further victimize the offender's spouse and child if the offender's family is known in the community.

The initial steps toward **notification** occur as part of the **risk assessment** process. The Arkansas Department of Correction is responsible for notifying the sheriff and the chief of police, **ACIC**, the offender, any supervising agencies and the victim. Sheriffs and chiefs of police are encouraged to have a written working agreement to ensure that all offenders in their jurisdictions are properly registered. The **notification** guidelines shown below and any special recommendations will be attached to the **Offender Fact Sheet**.

Level 1/Low Risk

- The law enforcement agency having jurisdiction, and other law enforcement agencies likely to encounter the offender. This may include state and federal law enforcement agencies, campus police, school safety officers, and the like.
- The offender. The fact sheet will be mailed to the offender at the same time that it is mailed to the Chief Law Enforcement Officer having jurisdiction. If the offender requests an **administrative review**, the Chief Law Enforcement Officer will be notified and asked to limit community **notification** to that indicated for Level I and any citizens thought to be at immediate risk, until the review has been completed.
- All adult members of the household where the offender is **residing** or intends to **reside**, unless the offender is **residing** or intends to **reside** in a residential treatment facility, group home, foster home, half-way house or other supervised living arrangement, in which case only the residence supervisor or foster parent should be notified.

- Victims or guardians of victims of adult offenders are notified through the VINE system operated by the Arkansas Department of Correction. Victims or guardians of victims of juvenile offenders should be notified by law enforcement.

Level 2/Moderate risk

- All parties specified in level 1 ***must*** be notified.
- The heads of agencies and organizations that serve individuals in the offender's target group must be notified. This may include, but is not limited to, schools, day care centers, community and youth groups, religious organizations, libraries, the Department of Human Services, women's organizations and shelters, park security, businesses frequented by children.
- State licensing boards and prospective employers will be notified, if requested by the licensing board or by the human resources manager for the employer, or if law enforcement sees the type of employment as bringing the offender and potential victims into contact.
- The heads of families or individuals with members that are of the age and gender of the offender's target group and are likely to encounter the offender, or live in the same neighborhood as the offender must be notified.

Level 3/high risk

- **All of the entities and individuals listed for Levels 1 and 2 must be notified**, including those designated as "discretionary" unless to do so would cause harm to the victim(s).

- **Notification** must be made to any member of the community whom the offender is known to be likely to encounter, based on the offender's prior history, recreational or religious interests, employment, or the characteristics of the offender's victims.

- **Notification** should be conducted by methods *devised* to notify all members of the public likely to encounter the offender. This should be done face-to-face between law enforcement and citizens to the extent possible. Those likely to encounter the offender, including all neighbors, are to be given an **Offender Fact Sheet** and cautioned about the appropriate use of the information.

- **Offender Fact Sheet** information on offenders rated at Level 3 (high risk) or Level 4 (**Sexually Violent Predator**) will be available to the public on the **ACIC** web site (http://www.acic.org/).

Level 4/Sexually Violent Predator

- **All of the entities and individuals listed for Levels 1 through 3 must be notified.**

- **Notification** of members of the general public in the vicinity of where the offender lives, travels and works should be done. It is preferable to notify these individuals in a face-to-face meeting, and to encourage assistance in monitoring the offender rather than instigating harassment, fear or hatred. However, open community meetings or meetings with neighborhood watch groups are also acceptable.

- Any individual having good reason may request an **Offender Fact Sheet** from the Chief Law

Enforcement Officer. Each individual given an **Offender Fact Sheet** must be advised that it is not for publication, but may only be used in accordance with the law and these guidelines.

- The Department of Community Correction will be asked to provide intensive supervision, if the offender falls under the jurisdiction of that agency.
- Polygraphing will be done on **reassessments**, unless clearly contraindicated in the view of the Sex Offender Assessment Committee.
- Community meetings may be held to inform residents of the area in which the offender is likely to be found.
- Printed material, posters, and electronic media may be used to notify and inform the public in the most necessary and potentially dangerous situations.
- The **Offender Fact Sheets** of all **Sexually Violent Predators** will be available to the public on the **ACIC** website.

REASSESSMENT (Section 14)

The adult offenders, classified Levels 1 through 3, may request **reassessment** five years after the date of the most recent **risk assessment. Reassessments** will, at the discretion of the Sex Offender Assessment Committee, include a polygraph, voice stress analysis or plethysmograph (measure of sexual interest examination). The cost of polygraph, voice stress analysis and/or plethysmograph examinations will be billed to the person being **reassessed**.

The juvenile offender may request **reassessment** two years after the date of the most recent **risk assessment**. Once the juvenile offender reaches age 18, the guidelines for adult offenders are to be followed. The files of such offenders will be transferred from the Family Treatment Program to Sex Offender Screening and Risk Assessment, which will conduct any further assessments.

Reassessment may be requested by parole or probation, any law enforcement agency, the court, or the Sex Offender Assessment Committee at any time, by submission of a statement of reason to Sex Offender Screening and Risk Assessment. These requests will be reviewed by the Sex Offender Assessment Committee and granted if, in the opinion of the committee, sufficient grounds have been stated. **Reassessment** of a juvenile must be ordered by the Juvenile Court having jurisdiction.

Reassessments, particularly those done on the basis of suspicion of recent deviant sexual activity, will include administration of a polygraph and/or plethysmograph (measure of sexual interest) examination. The cost of polygraph, voice stress analysis and/or plethysmograph examinations on referrals by law enforcement will be borne by the Sex Offender Assessment Committee.

Refusal of, or non-compliance with, **reassessment** will result in a written **notification** to law enforcement in the area in which the offender **resides,** and to any supervising agency.

Requests for **reassessment** may be made by phone (870-850-8429); fax (870-850-8446); mail (P.O. Box 6209. Pine Bluff, AR 71611-6209; or E-mail **(adc.sosra@arkansas.gov)**

by completing the form entitled Request for Sex Offender Reassessment.

Forms for requesting **reassessment** will be available from the **ACIC** web site.

Sex Offender Reassessment

Reassessment of (PRINT NAME) _____

(STREET ADDRESS) _____

(CITY, STATE, ZIP CODE) _____

Is requested by (PRINT NAME) _____

(PRINT NAME OF AGENCY REPRESENTED) _____

(MAILING ADDRESS) _____

(CITY, STATE, ZIP CODE) _____

(phone) _____ (FAX) _____

(E-mail address) _____

The reason for reassessment is

[ ] five year reassessment requested by offender

[ ] law enforcement or Community Correction has reason to believe risk level may have changed

[ ] the Court is considering relief for this offender of the requirement to register

Information justifying this request is as follows:

_____

_____

_____

(PLEASE ATTACH ANY ADDITIONAL INFORMATION THAT SUPPORTS THIS REQUEST)

_____

_____ (SIGNED) (DATE) _____

Usually the offender will be contacted within 30 days to set up an appointment.

Check here [ ] if delay is likely to increase risk of further victimization.

MAIL OR FAX THIS FORM TO: **SOSRA**
P.O. BOX 6209
Pine Bluff, AR 71611-6209

FAX (870-850-8446) E-mail SOSRA@arkansas.gov

TERMINATION (Section 15)

The offender whose offenses do not require lifetime registration (not convicted of an **aggravated sexual offense,** or a second or subsequent sexual offense), and who has maintained registration for fifteen years, may apply to the sentencing court for an order **terminating** the registration requirement. The **termination** procedure involves **reassessment** ordered by the court and an evidentiary hearing.

Offenders who have been convicted of (an) **aggravated sexual offense(s)**, are required to maintain lifelong registration. No appeal to the Court, or documentation of rehabilitation or treatment can relieve them of the obligation to register.

Juvenile courts may order **termination** of the registration requirement at any point during the Court's jurisdiction. Once the juvenile has attained his/her majority that places him/her beyond the jurisdiction of the Court, the registration requirements are the same as for an adult offender.

Aggravated Sexual Offense (Section 16)

"**Aggravated sex offense**" means an offense substantially equivalent to "aggravated sexual abuse" as defined in 18 U.S.C. § 2241 as it existed on March 1, 2003, which principally encompasses:

(A) Engaging or attempting to engage in sexual acts involving penetration with victims of any age through the use of force or the threat of serious violence; or causing or attempting to cause another person to engage in a sexual act either by using or threatening force against that other person or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

(B) Engaging in sexual acts involving the penetration of victims below the age of twelve (12) by knowingly rendering another person unconscious and then engaging in a sexual act with that other person; or by administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct and engaging or attempting to engage in a sexual act with that other person.

(C) Crosses a state line with intent to: engage or attempt to engage in a sexual act with a person who has not attained the age of twelve (12) years.

(D) Knowingly engages or attempts to engage in a sexual act with another person who has not attained the age of twelve (12) years; or knowingly engages or attempts to engage in a sexual act

under the circumstances in A and B above with another person who has attained the age of twelve (12) years but has not attained the age of sixteen (16) years and is at least four (4) years younger than the alleged offender.

Determination as to whether an offense qualifies as an "**Aggravated Sex Offense**" may depend on the circumstances surrounding the offense. Offenses that are likely to merit qualification as "**Aggravated Sex Offenses**" are denoted with "AGG" on the list of the target offenses. The court must indicate on the judgment and commitment or judgment and disposition form whether or not the offense is an **aggravated sex offense**.

Should there be any confusion regarding whether a sex offense qualifies as an "**Aggravated Sex Offense**" the Court will be contacted during the course of the assessment of the offender.

Individuals convicted of (an) aggravate sexual offense(s) are required to register for life.

SEXUALLY VIOLENT OFFENSE (Section 17)

Sexually violent Offenses include both **Aggravated Sexual Offenses** outlined above and **Sexual Abuse** as defined in 18 USC § 2242. This includes

A. causing another person to engage in a sexual act by threatening or placing that person in fear (but without fear of death, serious bodily injury, or kidnapping (e.g. "If your mommy finds out you did this she won't love you anymore.").

B. engaging in a sexual act with another person who is incapable of appraising the nature of the

conduct (e.g. an infant or severely developmentally disabled person) or is physically incapable of saying "no" (e.g. comatose or sleeping).

SEXUALLY VIOLENT PREDATOR (Section 18)

"**Sexually Violent Predator**" refers to a person who has been convicted of a **sexually violent offense** or a second or subsequent sexual offense and suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of predatory sexual violence. The designation is intended to identify those individuals who pose the highest level of threat to the community. The prosecutor should consider asking the court to determine whether an individual is a **Sexually Violent Predator**, if the offense

- Involved multiple victims,
- Was carried on for months or years with any victim,
- Caused or threatened serious harm to the victim,
- Involved bizarre, ritualistic or sadistic behaviors,
- Is the second or subsequent offense against a person,
- Is associated with a mental disorder, developmental disability, or personality disorder,
- Involved attempts on the part of the offender to manipulate him/herself into a position of power or authority over, or establish a relationship with the victim for the primary purpose of violation, exploitation, or victimization.

There are three potential routes for determination as to whether an individual should be designated a "**Sexually Violent Predator**."

1. If the prosecutor finds reason to believe that an offender may pose the highest **level of risk**, the prosecutor will notify the court in the "Prosecutor's Information" that a determination is being sought as to whether an individual is a **Sexually Violent Predator**. Upon adjudication of guilt for a sex offense, the Court shall have the individual sent to the Arkansas Department of Correction for evaluation pursuant to §12-12-918, or request that a member of the assessment team come to the local or regional detention facility where the offender is being housed. In either case the prosecutor is asked to mail, fax or e-mail the "Prosecutor's Information" and any associated documentation needed in preparation for the interview of the offender.

2. Alternatively the court may hold making the determination as to whether an individual is a **Sexually Violent Predator** in abeyance, sentence the offender, and await the completion of Sex Offender Screening and Risk Assessments evaluation of the incarcerated offender. Any individual convicted of a second or subsequent sex offense will have a new risk screening done, unless that individual has already been found by the court to be a **Sexually Violent Predator**.

3. The third procedure for determining whether an individual is a **Sexually Violent Predator** is available through ACA §12-12-922. If qualified examiners find during the course of the screening and **risk assessment** that grounds for believing that an individual may be a **Sexually Violent Predator** exist, a psychologist or psychiatrist

shall conduct further assessment to determine the presence of absence of a mental abnormality or personality disorder that would dispose the offender toward further sexual victimization.

Scheduling for offenders in the custody of the County shall be arranged between the sheriff and Sex Offender Screening and Risk Assessment (SOSRA). The evaluation will take place in a secure setting either at the Diagnostic Unit or the local or regional detention facility. The interview and testing will usually be completed within a day; this may take longer if a polygraph is warranted. Should additional time be needed, the individual may be housed at the Diagnostic Unit for up to three days.

The report of that assessment would be presented to the Sex Offender Assessment Committee, which will determine whether the offender meets the following conditions:

- The instant offense is a **sexually violent offense** as defined above ***OR*** the instant offense represents a second or subsequent conviction under the list of **target offenses** above, or substantially equivalent thereunto;
- There is credible evidence of a pattern of sexually violent acting out either shown by documentation of multiple victims or the persistence of victimization of a victim or victims over a time period of months or years;
- There is evidence of severe physical or mental trauma to the victim(s) that suggests a callousness or blatant disregard for the well being of others, such as threats or acts of serious physical harm to victim, the use of force beyond that necessary to subdue the victim, or sadistic or ritualistic aspects in the sexual assault;

- Establishment of a diagnosis based on the current version Diagnostic and Statistical Manual (DSM) of the American Psychiatric Association.

A copy of the assessment Report will be made available to all members of the Sex Offender Assessment Committee at least 10 days prior to a regularly scheduled meeting.

The Sex Offender Assessment Committee must vote as a whole to agree or disagree as to the assessment of an offender at Level 4, **Sexually Violent Predator.** However, the Chair of the Sex Offenders Assessment Committee will be required to poll any members of the Committee unable to attend a meeting, and document their vote based on the report. An affirmative vote by two-thirds of the members, including polled members, if any, will be required to assess an offender at Level 4, **Sexually Violent Predator**. The member who is designated to process the **administrative review**, if requested, will absent him/herself from the discussion and proceedings.

Sex offenders moving into the State of Arkansas from other states will be considered **Sexually Violent Predators**, if that, or an equivalent, determination has been made by the sending state. If terminologies or criteria differ, Sex Offender Screening and Risk Assessment (SOSRA) will request the offender's **risk assessment** file. SOSRA may make a determination based on that file, or may require the offender to submit to **risk assessment** in Arkansas. All sex offenders at other levels who are moving into Arkansas *must* be **reassessed.** The Department of Community Correction will provide the probationer or parolee a copy of the Sex Offender Screening and Risk Assessment advisement, and will ensure that the **ACIC**'s registration form has been completed.

The recommendation of the Sex Offender Assessment Committee will be provided to the court, as quickly as possible, usually within thirty (30) days of the examiner's gaining access to the offender. Should difficulty in obtaining documents slow the process, or should the next meeting of the Sex Offender Assessment Committee not be scheduled inside that 30-day window, the court will be notified when to expect the report. The **risk assessment** will not be admissible for purposes of sentencing. Should the offender refuse to cooperate or attempt deception at any point during the assessment, the Court will be notified.

The court retains jurisdiction to make a determination as to whether or not an individual is a **Sexually Violent Predator** for one year after sentencing or for the duration of incarceration whichever period of time is longer. Should the Sex Offender Screening and Risk Assessment team develop information that demonstrates the likelihood that an offender is a **Sexually Violent Predator**; this information will be provided to the Prosecuting Attorney who will determine whether a hearing on the matter is warranted.

Any Judgment and Commitment Order or Judgment and Disposition order received by the Arkansas Department of Correction or the Arkansas Department of Community Correction, on which the **Sexually Violent Predator** indicator is checked will be called to the attention of Sex Offender Assessment Committee which will check that a recommendation was made to the Court and a hearing has occurred. If there has been a breakdown in procedure, the Court will be immediately notified so that corrective action may be taken.

At the discretion of the Sex Offender Assessment Committee, a Level 3, High Risk, **notification** may be immediately sent to law enforcement.

The offender will be notified of the decision of the Sex Offender Assessment Committee, and of his/her right to an **administrative review**. If the offender does not exercise his/her right to an **administrative review** within fifteen (15) days of receipt of the advisement, or upon finding that the offender does not **reside** at the address provided by the offender to **ACIC**, a new **Offender Fact Sheet** reflecting Level 4, **Sexually Violent Predator** will be sent to law enforcement. If the offender exercises his/her right to an **Administrative Review**, Level 3 **notification** will be continued until such time as the offender has exhausted his/her administrative remedies.

Upon receipt of the results of the **administrative review**, the offender has thirty (30) days to file a request for a **judicial review** in Pulaski County Circuit Court, or in the County in which the sex offender **resides**, attends an institution of training or education, or does business. If the court serves the Secretary of the Sex Offender Assessment Committee a notice of the petition, **notification** will continue at Level 3. If the offender does not file for a **judicial review** a new **Offender Fact Sheet** reflecting Level 4, **Sexually Violent Predator** will be sent to law enforcement.

If the Secretary of the Sex Offender Assessment Committee is served, the Secretary will make available to the court the **record** of the Committee's findings and copies of all documents related to the process of screening and **risk assessment**. The Secretary may ask the court to seal any

of the documents that could place third parties at risk of harm.

The ruling by the court shall be considered a final judgment. **Notification** at the **risk level** recommended by the court shall be commenced as soon as is feasible.

RECORDS (Section 19)

The Sex Offender Assessment Committee will maintain all documentation gathered and all assessments administered. Original documents will be maintained for at least one year, during which time case files may be digitally imaged. When a year has passed and accuracy of the digital images is demonstrated, the original documents may be destroyed.

Access to documents generated by the Sex Offender Assessment Committee may be granted to **ACIC**, and to any law enforcement agency or court of competent jurisdiction.

The offender may request from Sex Offender Screening and Risk Assessment copies of all reports generated and a list of all documents obtained from other agencies along with the address(es) of any agency(ies). A copy of the tape of the interview may also be requested. All copies of tapes and documents will be done at a cost that reflects the actual cost of making copies. The cost for the coming year will be approved at the annual meeting of the Sex Offender Assessment Committee. This cost must be paid prior to the copying of any materials.

The Sex Offender Assessment Committee will not provide copies of working notes, or of copywrited psychological tests that are restricted to licensed professionals. Nor will

copies of **records** generated by other agencies be released except by written release from the producing agency, or under court order. If such **records** are released, they will be redacted to eliminate addresses of victims or persons making witness statements.

Copies of documents obtained from outside sources will not be provided, except to the originator or as ordered by the court.

These documents are not subject to the Freedom of Information Act.

RESEARCH (Section 20)

The assessment process will be the subject of ongoing research in an effort to develop an Arkansas specific actuarial tool, and to improve the accuracy of the overall **risk assessment** process.

Access for the purpose of research must be requested in writing and is subject to approval by the Arkansas Department of Correction with recommendation by the Sex Offender Assessment Committee.

IMMUNITY (Section 21)

Public officials, public employees, public agencies, and members of the Sex Offender Assessment Committee are immune from civil liability for good faith conduct under Act 989 of 1997, as amended.

Nothing in Act 989 shall be deemed to impose any liability upon, or give rise to a cause of action against, any public official, public employee, public agency, or member of the Sex Offender Assessment Committee for any discretionary

decision to release relevant and necessary information, unless it is shown that the official, employee, agency or Committee member acted with gross negligence or in bad faith.

DISCLAIMER

There is no foolproof method of predicting human behavior.

The best prediction of general risk is based on actuarial studies of large groups. For example, the insurance industry predicts higher rates of automobile accidents for males less than 27 years of age (and charges accordingly). Given a large enough group, the prediction of the rate of accidents will be highly accurate. However, this prediction does not extend to identifying the individuals in that group who will have the accidents. Prediction can be improved by taking into account what we know about an individual. A young person who drinks heavily, has had speeding tickets, skips school and likes to show off his red sports car can be predicted to be a somewhat higher risk than a well behaved, drug free, honor student who is only allowed to drive the family car to school and on errands for mom. Even so, either of these individuals can have an accident.

While the system being used is state-of-the-art and will be improved as statistical and psychological prediction is further refined, there will be Level 4, **sexually violent predators** who do not reoffend. And there will be Level 1, low risk offenders who commit heinous crimes. The prediction being made is the risk posed to the community *if* the individual reoffends. For example, an offender with multiple victims or violence associated with a sex crime is

likely to put a broader segment of the community at more serious risk than an offender with an underage girl friend. Similarly an offender with compulsive sexual habits (E.g. exhibitionism) is prone to repeat acts, but does not pose the same overall **level of risk** to the community as does an offender who offends less frequently, but who is inclined to sadistically or ritually torture his/her victim.

All law enforcement officers involved in the process should make it clear during the process of **notification**, that the protection afforded by enhanced tracking, awareness, supervision and treatment of sex offenders, is not absolute protection. All parents should be encouraged to teach their children about appropriate and inappropriate touching by family, friends, baby sitters, teachers and others with whom their children come into contact.

Assistance and information regarding this is available through the Arkansas Commission on Child Abuse, Rape and Domestic Violence, 4301 W. Markham, Slot 606, Little Rock AR 72205-7199. (Phone 501-661-7975, Fax 501-661-7977). Their web site is http://www.accardv.uams.edu.

REVIEWED UNDER THE ADMINISTRATIVE PROCEDURES ACT, 09/02/2004

INDEX

BACKGROUND Page 1

OVERVIEW OF THE REGISTRATION, ASSESSMENT & NOTIFICATION PROCESS Page 2

TARGET OFFENSES (Section 1) Page 4

ARKANSAS CRIME INFORMATION CENTER (ACIC) (Section 2) Page 5

RESIDENCY (Section 3) Page 9

SEX OFFENDER SCREENING ADVISEMENT (Section 4) Page 10

QUALIFICATION OF EXAMINERS (Section 5) Page 12

RISK ASSESSMENT PROCESS (Section 6) Page 12

LEVELS OF RISK FOR ADULT AND JUVENILE OFFENDERS (Section 7) Page 13

OVERRIDES AND DEPARTURES (Section 8) Page 14

OFFENDER FACT SHEET (Section 9) Page 16

ADMINISTRATIVE REVIEW (Section 10) Page 18

JUDICIAL REVIEW (Section 11) Page 19

NOTIFICATION PROCEDURES (Section 12) Page 19

NOTIFICATION GUIDELINES (Section 13) Page 21

REASSESSMENT (Section 14) Page 23

TERMINATION OF REGISTRATION (Section 15) Page 25

AGGRAVATED SEXUAL OFFENSES (Section 16) Page 25

SEXUALLY VIOLENT OFFENSE (Section 17) Page 26

SEXUALLY VIOLENT PREDATOR (Section 18) Page 26

RECORDS (Section 19) Page 29

RESEARCH (Section 20) Page 29

IMMUNITY (Section 21) Page 30

DISCLAIMER (Section 22) Page 30

(4)

No. 06-769

FILED
APR 3 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

DONALD WEEMS AND MICHAEL BRIGGS,
Petitioners,

v.

LAWRENCE JOHNSON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

GREGORY T. KARBER
C. BRIAN MEADORS
ROBERT D. KELLY
Counsel of Record
PRYOR, ROBERTSON & BARRY, PLLC
315 NORTH 7TH STREET
P.O. DRAWER 848
FORT SMITH, AR 72902-0848
(479) 782-8813
(479) 785-0254 facsimile

Attorneys for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

SUMMARY OF THE ARGUMENT 1

ARGUMENT 1

I. Respondents' attempts to minimize the procedural deficiencies fail. 1

A. Arkansas's risk assessment scheme affirmatively bars counsel from the interview.. 2

B. Respondents' intimation that Petitioners can obtain all the documentary evidence against them is incorrect... 3

II. Respondents' attempt to distinguish other states' procedures proves that there is a split of authority on minimum procedural protections due. 4

III. Respondents' allegation that Petitioners failed to raise burden of proof before the Eighth Circuit misses the point.. 5

CONCLUSION 6

TABLE OF CITED AUTHORITIES

STATUTES

ARK. CODE ANN. § 12-12-917(d)(2)(B)(i)-(ii) 3

ARK. CODE ANN. § 12-12-918(a)(2)(B) 2

Sex and Child Offender Guidelines and Procedures, Code Ark. R. 004 00 002 (2002) 2, 3, 4

SUMMARY OF THE ARGUMENT

Respondents are wrong to claim that Petitioners have a right to counsel. Petitioners are barred from bringing a lawyer to the assessment interview. Respondents' intimation that Petitioners can review the documents being used against them is also incorrect. In making an assessment, an interviewer may use documents whose contents not disclosed, nor the author identified.

Respondents' attempt to distinguish other states' procedures and case law affecting those procedures prove the point that there is a split of authority on what minimum procedural protections are due.

Respondents' allegation that Petitioners failed to raise "burden of proof" before the Eighth Circuit is incorrect and misses the point. There is no burden of proof in the Arkansas scheme, and that is one of the reasons why Petitioners challenged the scheme's (lack of) procedural due process protections. Further, Arkansas's lack of an articulated burden of proof standard makes it unconstitutional according to court decisions from Massachusetts, Wyoming, New York, and the Third Circuit. Yet the Eighth Circuit has upheld the scheme. This Court should resolve this conflict.

ARGUMENT

I. Respondents' attempts to minimize the procedural deficiencies fail.

Petitioners' Certiorari Brief identified significant procedural deficiencies in the risk assessments, including: no right to view all the evidence considered against the offender; no right to confront witnesses; no right to see all the documentary

evidence; the prohibition of counsel at the interview; no right to call witnesses on the offender's behalf; and very limited judicial review of the assessment. *See* Petitioners' Certiorari Brief at pp. 4-6.

The Respondents attempt to minimize these deficiencies, and in their attempt make two incorrect claims.

A. Arkansas's risk assessment scheme affirmatively bars counsel from the interview.

Respondents claim that Petitioners "may be represented by counsel" as part of their initial risk assessment. In support of that averment, Respondents cite to Ark. Code Ann. § 12-12-918(a)(2)(B) and the Guidelines, reproduced at page 8a in the Respondents' Brief. *See* Respondents' Brief at 13.

Respondents' averment is incorrect. The Eighth Circuit held that sex offenders could not have counsel present in the risk assessment interviews. *See* the Eighth Circuit opinion, reproduced at Petitioners' Brief in Support of Certiorari at page 16a. The Respondents admitted the same: "It is the examiners' general practice not to allow counsel to accompany sex offenders during the assessment interview." Respondents' Brief at 14. The citations offered by the Respondents, Ark. Code Ann. § 12-12-918(a)(2)(B) and the Guidelines, are not to the contrary. Section 12-12-918 applies only to Level 4 offenders; the Guidelines do not give an offender the right to bring his lawyer to the interview.

Indeed, the Arkansas risk assessment scheme effectively punishes a sex offender for injecting a lawyer into the process. Both the Respondents and the Eighth Circuit believe that an offender having a lawyer at the interview is a bad thing. It would "entail rather significant fiscal and

administrative burdens." Respondents' Brief at 17; Eighth Circuit opinion, reproduced at Petitioners' Brief in Support of Certiorari at page 17a. And if an offender is deemed to be not as forthcoming as the interviewer would like (for example, by burdening the interviewer with the presence of a lawyer), then the offender would receive a higher risk determination. *See* Guidelines, reproduced in Respondents' Brief at 23a.

B. Respondents' intimation that Petitioners can obtain all the documentary evidence against them is incorrect.

Respondents intimate that Petitioners can review and challenge the documents being used against them in the risk assessments. Respondents' Brief at 13-15. Such an intimation is incorrect. There is no right to the documents obtained from third parties, but only a list of the documents. Ark. Code Ann. § 12-12-917(d)(2)(B)(i)-(ii). The Freedom of Information Act does not apply to risk assessments. *See* Guidelines, reproduced at page 55a of the Respondents' Brief. Accordingly, there is no way for an offender to compel document production. And even if records are produced, the witnesses' identities will be redacted. *See* Guidelines, reproduced at page 55a of the Respondents' Brief.

Thus, if an interviewer were to receive a letter generated by the offender's neighbor, the offender has no right to see the contents of the letter, nor even know the neighbor's identity.

At the interview, an offender could be questioned about allegations in the neighbor's letter. "If the answers do not match up with the documents previously obtained, the interviewer may conclude that the individual is withholding information or being deceptive." Guidelines, reproduced at

Respondents' Brief at 23a. That could result in the offender being assigned a higher risk determination. *Id.*

In other words, a sex offender can receive a higher risk determination if his answers conflict with the interviewer's secret evidence.

II. Respondents' attempt to distinguish other states' procedures proves that there is a split of authority on minimum procedural protections due.

Respondents contend that the various, conflicting decisions regarding procedural due process "do not reflect any disagreement on the operative legal standards." Respondents' Brief at 15.

Respondents' argument misplaces the focus of Petitioners' question. The split of authority is not in the operative procedures adopted by each state; it is in the various holdings regarding the minimally required constitutional procedural due process.

The Eighth Circuit's holding differs from other jurisdictions. It has reached a different conclusion as to what is or is not the minimally required constitutional procedural due process in sex offender risk assessments. Decisions from Massachusetts, New York, New Jersey, Oregon, Wyoming, and the Third Circuit find constitutionally-based safeguards that differ from one another and differ from the Eighth Circuit. *See* cases discussed at pages 9-12 of the Petitioners' Certiorari Brief.

Indeed, the fact that there are so many differing states with so many differing judicial, as well as legislative, standards simply proves the point that there is no settled

holding as to the minimally required constitutional procedural due process in risk assessments.

III. Respondents' allegation that Petitioners failed to raise burden of proof before the Eighth Circuit misses the point.

In their final argument, the Respondents claim that the Petitioners raise the burden of proof issue for the first time in their Certiorari Brief. Respondents' Brief at 21.

The Respondents miss the point. The Petitioners, from the very start, have challenged the procedural due process of Arkansas's risk assessment procedure. As noted by the Eighth Circuit, the Petitioners "complain primarily that the procedures do not afford the 'rigors of an adversarial process.'" Eighth Circuit opinion, reproduced at Petitioners' Brief in Support of Certiorari at page 16a.

The "burden of proof" question serves two purposes in the Petition for Certiorari. First, it highlights the split of authority among the States and Circuits as to the minimally required constitutional procedural due process standards in risk assessments. Massachusetts and Wyoming have established a constitutional "burden of proof" minimum that conflicts with holdings in the Third Circuit and New York. *See* Petitioners' Certiorari Petition at 11. And those four jurisdictions are in conflict with the Eighth Circuit, which has upheld a risk assessment scheme that has no burden of proof standard whatsoever.

Second, Arkansas's lack of an articulated burden of proof standard reveals another serious procedural flaw. If not even a "preponderance" standard is required, then is any level of proof required? Could the assessment committee ignore nine

favorable letters from law enforcement officers, psychiatrists, and employers, and instead assign a high risk determination solely on the basis of a single (and undisclosed) letter from a disgruntled neighbor? Presumably yes, because the Arkansas scheme has no burden of proof at all. This is another reason why Petitioners "complain primarily that the procedures do not afford the 'rigors of an adversarial process.'"

CONCLUSION

The Eighth Circuit has upheld a risk assessment scheme that lacks procedural protections that other courts have held are constitutionally mandated. This Court should grant certiorari and resolve the conflict.

Respectfully Submitted,

Gregory T. Karber
C. Brian Meadors
Robert D. Kelly
Counsel of Record
PRYOR, ROBERTSON & BARRY, PLLC
315 North 7th Street
P.O. Drawer 848
Fort Smith, AR 72902-0848
(479) 782-8813 - Telephone
(479) 785-0254 - Facsimile

Attorneys for Petitioners